93-628

No._____

Supreme Court, U.S.
FILED
OCT 21 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM MINEER ..... PETITIONER

versus

FLEMING COUNTY, KENTUCKY; FLEMING COUNTY FISCAL COURT; JEWELL CALL, Fleming County Judge/Executive, in his official and individual capacity; and the FLEMING COUNTY FISCAL COURT MEMBERS, Gary C. Harmon, Andy Cole, John Sims, Ronnie Carpenter, William Thompson, and L.C. Cord, in their official and individual capacities ..... RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a County Judge Executive is entitled to qualified immunity in an action under 42 U.S.C. Section 1983, based upon a denial of procedural due process under the 14th Amendment when he unlawfully discharged for political reasons a county road foreman who had a clearly established property right to continued employment without following the pretermination process as provided by Kentucky statutes?

2. Whether a County Judge Executive is entitled to qualified immunity in a 42 U.S.C. Section 1983 action based upon the 1st Amendment to the United States Constitution when in violation of clearly established law he terminated a county road supervisor for politically motivated reasons?

3. Whether the magistrates of a county fiscal court are entitled to qualified immunity in an action under 42 U.S.C. Section 1983, based upon a denial of procedural due process under the 14th Amendment when they unlawfully discharged for political reasons a county road foreman who had a clearly established property right to continued employment without following the pretermination process as provided by Kentucky statutes?

4. Whether the magistrates of a county fiscal court are entitled to qualified immunity in a 42 U.S.C. Section 1983 action based upon the 1st Amendment to the United States Constitution when in violation of clearly established law he terminated a county road supervisor for politically motivated reasons?

LIST OF PARTIES

The Petitioner is William Mineer. The Respondents are Fleming County, Kentucky; Fleming County Fiscal Court; Jewell Call, Fleming County Judge Executive, in his official and individual capacity; and the Fleming County Fiscal Court Members at the time this action was commenced, including Gary C. Harmon, District 1 Magistrate, Andy Cole, District 2 Magistrate, John Sims, District 3 Magistrate, Ronnie Carpenter, District 4 Magistrate, William Thompson, District 5 Magistrate, and L.C. Cord, District 6 Magistrate, all in their official and individual capacities .

TABLE OF CONTENTS

Questions Presented for Review i

List of Parties ii

Table of Authorities v

Opinions Below 1

Jurisdiction 2

Constitutional Provisions and Rules 2-3

First Amendment to the Constitution of the United States 2

Fourteenth Amendment to the Constitution of the United States 2

Title 42 United States Code Section 1983 2

Kentucky Revised Statutes

K.R.S. 179.020 3

K.R.S. 179.060 4

K.R.S. 67.910 4

Statment of the Case 4-13

Reason for Granting the Writ 13-19

I. The United States Court of Appeals for the Sixth Circuit Erroneously made two rulings in regard to Judge/Executive Call's qualified immunity that decides and important question of Federal Law which has not been, but should be settled 13-17

TABLE OF CONTENTS (continued)

II. The Sixth Circuit Court of Appeals erroneously granted the members of the Fiscal Court qualified immunity when they, in conjunction with the County Judge/Executive, terminated Mineer in violation of his Fourteenth and First Amendment rights 17-19

Conclusion 19

APPENDIX:

Appendix A - First Opinion and Order of the United States Court of Appeals for the Sixth Circuit 1a-28a

Appendix B - Final Clarifying Opinion and Order of the United States Court of Appeals for the Sixth Circuit 29a-31a

Appendix C - Memorandum Opinion and Order of the United States District Court for the Eastern District of Kentucky 33a-56a

TABLE OF AUTHORITIES

CASES:

Branti v Finkel,
445 U.S. 507, 63 L.Ed.2d 574,
100 S.Ct. 1287 (1980) 13,15

Cagel v Gilley,
957 F.2d 1347 (6th Cir. 1992) 14

Christian v Belcher,
888 F.2d 410 (6th Cir. 1989) 13,14,16

Elrod v Burns,
427 U.S. 347, 49 L.Ed.2d 547, 96
S.Ct. 2673 (1976) 13,15

Gossman v Allen,
950 F.2d 338 (6th Cir. 1991). 9

Mitchell v Forsythe,
472 U.S. 511, 86 L.Ed.2d
411 105 S.Ct. 2806 (1985) 9

Rutan v Republican Party of Illinois,
497 U.S. 62, 111 L.Ed.2d 52,
110 S.Ct. 2729 (1990) 7

Upton v Thompson,
930 F.2d 1209 (7th Cir 1991) 14

Statutes

K.R.S. 179.020 16

K.R.S. 179.060 17,18

K.R.S. 69.710(7) 18

Kentucky Attorney General Opinion 78-4302 16

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

WILLIAM MINEER ..... PETITIONERS

versus

FLEMING COUNTY, ET. AL. ..... RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Petitioner, William Mineer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 3, 1993.

OPINIONS BELOW

The first opinion and order of the United States Court of Appeals for the Sixth Circuit, *Mineer v Call*, Sixth Circuit Number 92-5368, attached hereto as Appendix "A", was entered on May 4th, 1993. Pursuant to Sixth Circuit Rule 24, it was not recommended for full text publication. The final clarifying opinion and order of the United States Court of Appeals for the Sixth Circuit *In Re: Jewell Call*, Sixth Circuit number 93-6046, attached hereto as Appendix "B", was entered on

September 3rd, 1993. It is not reported in any publication.

The Memorandum Opinion and Order of the United States District Court, Eastern District of Kentucky, Lexington Division, Civil Action 91-4, *Mineer v Fleming County, et. al.*, attached hereto as Appendix "C", was entered on March 4th, 1992. It is not reported in publication.

JURISDICTION

The final opinion and order of the United States Court of Appeals for the Sixth Circuit was entered on September 3, 1993. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States is involved insofar as it provides:

> Congress shall make no law... abridging the freedom of speech...

The Fourteenth Amendment to the United States Constitution is involved insofar as it provides:

> No State shall deprive any person of life, liberty, or property without due process of law...

Title 42 U.S.C. Section 1983, is involved insofar as it provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any

State...subjects or causes to be subjected any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law.

The Kentucky Revised Statutes are involved in the following pertinent parts:

K.R.S. 179.020. County Road Engineer or Supervisor

"(1) The County Judge/Executive of each county, with the consent of the fiscal court, may employ a county road engineer. Any person so employed shall be either a civil or highway engineer licensed in accordance with KRS Chapter 322..."

(2) if the fiscal court does not provide for a county road engineer, the duties of the county road engineer...shall be performed by a County Road Supervisor, who shall be employed by the County Judge/Executive with the consent of the fiscal court and who may be removed in the same manner provided for county road engineers. No person shall be employed County Road Supervisor unless he meets the following requirements:

(a) he has at least three years practical road building experience of a nature satisfactory to examining authorities selected by the Bureau of Highways for the Commonwealth of Kentucky, and

(b) he has passed an examination, either oral or written, or both, given by the examining authorities, and has received a certificate of qualification from the authorities.

(7) The period of employment for any county road engineer or county road supervisor shall be two or four years, with the discretion of the fiscal court, beginning with the second Tuesday in January in an even numbered year. Other terms of employment, and the salaries of all persons employed under the provision of this section shall be fixed by the fiscal court."

KRS 179.060 Removal of Engineer—Filling a Vacancy

"(1) The county judge/executive may remove the county engineer, appointed under KRS 179.020, at any time for incompetency, malfeasance, or misfeasance in office upon written charges after a hearing of which 10 days notice shall be given by serving a copy of the charges upon the county engineer. The hearing shall be at the courthouse, in the county seat.

KRS 67.710 Powers and Duties.

"(1) The county judge/executive shall be the chief executive of the county and shall have all the powers and perform all the duties of an executive administrative nature vested in the county. His responsibilities shall include, but are not limited to the following: exercise with the approval of the fiscal court the authority to appoint, supervisor, suspend and remove county personnel (unless otherwise provided by state law).

STATEMENT OF THE CASE

Petitioner, William Mineer, was formerly the Fleming County, Kentucky, Road Supervisor. The

named Defendants are as follows: Fleming County; Fleming County Fiscal Court; Jewell Call, Fleming County Judge/Executive; and Fleming County Magistrates, Gary C. Harmon, Andy Cole, John Sims, Ronnie Carpenter, William Thompson, and L.C. Cord.

In 1978, Mineer was recommended for the post of Fleming County Road Supervisor by then Fleming County Judge/Executive, Bill Owens ("Owens") and ratified by the fiscal court. Mineer held this position for two more four year terms upon Owens' recommendation and the then Fiscal Court's ratification. In January of 1986, at the end of Mineer's third four year term, Owens again recommended Mineer for the job. However, the magistrates voted 5 to 1 against his reappointment.

Mineer continued to work as de facto supervisor until September of 1986 when another ballot was taken by the Fiscal Court resulting in a tie vote of 3 to 3 which Judge/Executive Owens broke in Mineer's favor. This was for a two year term to begin retroactively in January of 1986, expiring in January of 1988. In January of 1988, despite Owens' failure to submit his name to the Fiscal Court for approval, Mineer continued to work as road supervisor. In May of 1989 Owens lost the primary election for County Judge/Executive to current Fleming County Judge/Executive, Jewell Call ("Call"). While still in office but after losing the primary, Owens resubmitted Mineer's name to the Fiscal Court for the post of road supervisor. Mineer was reappointed to a four year term, retroactively beginning in January of 1988 and extending to January of 1992.

In September, 1989, Mineer announced that he would run as a write-in candidate for County Judge Executive and took a leave of absence from his County Road Supervisor post to do so.

In November of 1989, Call was elected County Judge/Executive. He took office in January of 1990, as did a newly elected Fiscal Court. In an action taken January 1990, the new Fleming County Fiscal Court voted to nullify the contract they had with Mineer in which he was appointed to a four year term as County Road Supervisor effectively terminating his employment without any notice or hearing in the middle of his four year term.

Mineer then brought a claim pursuant to 42 U.S.C. Sections 1983, 1985, and 1988, alleging that the Fiscal Court and Judge/Executive acted in violation of his First, Fifth, and Fourteenth Amendment rights under the United States Constitution in discharging him from his office and that his removal was politically motivated punishment for the exercise of his constitutional rights.

Following the close of discovery, the Defendants filed a motion for summary judgment as to all claims and asserted the affirmative defense of qualified immunity.

In their motion for summary judgment, the Respondents/Magistrates contended they were entitled to qualified immunity because they acted in good faith and without malicious intent in regard to Mineer. They contended that Mineer had no expectation of continued employment because the former Fiscal Court did not

have authority to appoint him for a term which outlasted its own. They further argued that under Kentucky law, they were without authority to nominate or appoint employees and thus were incapable of misusing that power within the context of 42 U.S.C. 1983, and since it is the County Judge/Executive who has the power to appoint and remove the road supervisor, they, as magistrates, should be entitled to official immunity and granted summary judgment. The Magistrates' final contention was that public policy and tradition support a right of a public official to hire and fire on the basis of party affiliation and that despite this court's holding in *Rutan v Republican Party of Illinois*, 497 U.S. 62 (1990), they should have the authority to terminate employees because of their political differences.

In response, Petitioner argued that the Respondents (Magistrates and County Judge/Executive) incorrectly interpreted Kentucky law and that under the First Amendment he had a right to free speech without fear of reprisal because the position of County Road Supervisor is not policy making. He further responded that the Respondents were not entitled to qualified immunity because the law against terminating employees for politically motivated reasons was firmly established at the time the Respondents terminated him and that the magistrates and county judge/executive violated a clearly established right that reasonable officials should have known was unlawful.

The Respondents then replied raising several new issues. They contended that Mineer had no property interest in his employment and that his due process

rights were not infringed upon because he failed to ask for a hearing after he was terminated.

They also reiterated their defense of qualified immunity arguing that even where there has been a violation of a clearly established right it must be determined whether a reasonable official could reasonably have believed the action taken was lawful. Thus they argued that under the prevailing statutory and case law they had a reasonable basis to believe that Mineer's four year appointment was improper and that they were entitled to qualified immunity because political considerations are appropriate in employment decisions involving policy making personnel.

FEDERAL DISTRICT COURT

The Magistrates Claim for Qualified Immunity

Because the District Court granted summary judgment in favor of the Magistrates as to the First Amendment and State Law Wrongful Discharge claims, they found it unnecessary to rule on the issue of their qualified immunity as to these claims. As to the Magistrates qualified immunity in regard to the due process issue, the District Court found that a jury question existed as to whether the Magistrates should reasonably have known of Mineer's right to a notice and hearing before termination. Since this is a question of which qualified immunity turns, the court declined to return summary judgment to the Magistrates on the due process claim.

Claims Against the County Judge/Executive

As to Mineer's state law causes of action as well as his common law wrongful discharge claim, the District Court denied Judge/Executive Call's qualified immunity relying on the Sixth Circuit case of *Gossman v Allen*, 950 F.2d 338 (6th Cir. 1991), which held that qualified immunity is not an available defense to claims that do not invoke federal law whatsoever. As to Mineer's federal law claims, the District Court held that Judge/Executive Call's defense of qualified immunity turned on whether a reasonable official in Call's shoes would have known that terminating Mineer's employment violated his First, Fifth, and Fourteenth Amendment rights. Holding that these are jury questions, the District Court held that these are matters that cannot be decided on a motion for summary judgment.

INTERLOCUTORY APPEAL TO THE SIXTH CIRCUIT COURT OF APPEALS

Judge/Executive Call and six magistrates appealed the portions of the District Court's opinion which denied them qualified immunity to the Sixth Circuit Court of Appeals as a matter of right pursuant to *Mitchell v Forsythe*, 472 U.S. 511 (1985). After the issues were briefed, the Court of Appeals delivered its first of two extremely confusing opinions and orders.

In the first of the Sixth Circuit's opinions, the Court, per Judge Churchill, arguably reversed the District Court's judgment and granted the magistrates motion for summary judgment in regard to qualified

immunity on the Fourteenth Amendment issue. It further seemed to affirm the denial of the Judge/Executive's motion for summary judgment on qualified immunity.

The confusion stems from a passage in the Sixth Circuit's opinion that reads as follows:

> "James P. Churchill, Senior District Judge, delivered the opinion of the court. Guy, Circuit Judge, delivered a separate opinion, concurring in part and dissenting in part, in which Ryan, Circuit Judge, concurred."

Judge Churchill found that the Magistrates were qualifiedly immune, but Judge/Executive Call was not qualifiedly immune. Judge Guy would grant both the Magistrates and the Judge/Executive qualified immunity. Based on the above passage, the defendants argued that the dissenting opinion of Judge Guy, in which Judge Ryan arguably concurred is actually the majority opinion even though Judge Churchill delivered the opinion of the court. If this was the case, then all three judges concurred that the magistrates were entitled to qualified immunity with respect to both the Fourteenth Amendment Procedural Due Process claim and the First Amendment claim.

However, in his dissent, Judge Guy opined that the County Judge/Executive was entitled to qualified immunity on both the Fourteenth and First Amendment claims. Arguably, Judge Ryan concurred with him. Thus the defendants argued that Judge/Executive Call should have been granted qualified immunity because

two of three judges so agreed in a dissent.

After this, the defendants, by counsel, filed a Motion to Enforce the Mandate of the District Court, which the plaintiff opposed. The District Court, noting that the Sixth Circuit's opinion was "*rather confusing*", held that *Judge Churchill's* opinion was actually the "opinion of the Court", thus holding the magistrates entitled to qualified immunity and that the claims against Defendant Call should be set for trial. However, the District Judge allowed Defendant Call thirty days to take appropriate action to clarify the decision of the Sixth Circuit Court of Appeals.

Defendant Call then filed a Petition for Writ of Mandamus requesting the Court of Appeals to enter an order directing the District Court to act in conformity with the May 4, 1993, opinion of the Sixth Circuit and to dismiss the plaintiff's complaint, with prejudice. In response to the petition, the Court of Appeals, Judges Guy, Ryan, and Churchill sitting, entered a clarifying order on September 3, 1993, directing that Judge Churchill's opinion expressed the majority result with respect to the magistrates, but Judge Guy's opinion, even though written as a dissent, stated the Court's conclusions with respect to Judge/Executive Call. In view of this clarification the Court ordered that the Petition for Writ of Mandamus be dismissed, and that the District Court take all appropriate steps to enforce the Sixth Circuit's opinion as stated above.

This Petition for a Writ of Certiorari to the Supreme Court of the United States followed.

SIXTH CIRCUIT COURT OF APPEALS SUBSTANTIVE REASONING

As for the magistrates claim of qualified immunity, the Sixth Circuit held that according to the applicable Kentucky statutes, the members of the fiscal court did not have the legal capacity to deprive the plaintiff of constitutional rights in connection with his termination and thus concluded that the magistrates were entitled to qualified immunity with respect to the Fourteenth Amendment claim as well as the First Amendment claim.

In regard to County Judge/Executive Call's claim for qualified immunity on the Fourteenth Amendment due process claim, Appellate Judge Guy opined that Kentucky law prohibited a fiscal court from contracting with a road supervisor for employment beyond the fiscal court's term in office. Thus, he concluded that Mineer did not have valid contract extending beyond January, 1990, and therefore, Judge/Executive Call acted reasonably in determining that it was lawful that Mineer did not have a recognizable property interest in his job, and therefore granted Judge/ Executive Call qualified immunity.

With respect to Judge/Executive Call's claim of qualified immunity as a defense to the plaintiff's First Amendment claim, Appellate Judge Guy reviewed the relevant case law on politically motivated personnel decisions including United States Supreme Court cases as well as Sixth Circuit cases. In concluding that the state of the law on that issue was unsettled, he held that

it could not be said that Mineer had a clearly established right as County Road Supervisor to be free from politically motivated dismissal and thus granted Judge/Executive Call qualified immunity on that issue.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. The United States Court of Appeals for the Sixth Circuit erroneously made two rulings in regard to Judge/Executive Call's qualified immunity that decides an important question of federal law which has not been, but should be settled.

First, despite this Court's rulings in *Branti v Finkel*, 445 U.S. 507 (1980), *Elrod v Burns*, 427 U.S. 347 (1976), and the Sixth Circuit's ruling in *Christian v Belcher*, 888 F.2d 410 (6th Cir. 1989), the Court of Appeals granted Judge/Executive Call qualified immunity on the rationale that patronage dismissal law was insufficiently developed at the time of Mineer's dismissal making Call's actions objectively reasonable. However, in light of the above cited case, the law *was* clearly established that Call was constitutionally prohibited from dismissing Mineer solely because of his political association and/or expression.

Call candidly admitted in his deposition that since Mineer was supporting the other man he didn't want to keep him on. The law of Sixth Circuit was clearly established that before a County Judge/Executive could terminate ones employment for political reasons, he

would have the burden of demonstrating that political loyalty is essential to the discharge of the persons governmental responsibilities. *Christian*, Supra. Judge Call simply failed to meet this burden and should not have been cloaked with the defense of qualified immunity.

The Sixth Circuit, in the recent case of *Cagel v Gilley*, 957 F.2d 1347 (6th Cir. 1992), held that to find a clearly established constitutional right, a district court within the Sixth Circuit must find binding precedent from the Supreme Court, the Sixth Circuit, or from itself. In the case at hand, the Sixth Circuit Court of Appeals, in *Belcher*, Supra, had already ruled that a County Judge/ Executive could not constitutionally terminate a person in position analogous to Mineer's for purely political reasons. Thus the Sixth Circuit was clearly in error in ruling that Mineer did not have a clearly established right as County Road Supervisor to be free from politically motivated dismissal.

The reason this Court should grant this Petition for Certiorari is that, as Justice Powell wrote in his dissent in *Branti*, Supra, "The standard [for politically based firings] articulated by the court is framed in vague and sweeping language. Elected and appointed officials at all levels no longer will know when political affiliation is an appropriate consideration in filling a position." 445 U.S. at 524. Further, as the Seventh Circuit of Appeals in *Upton v Thompson*, 930 F.2d 1209 (7th Cir. 1991) and a commentator therein noted:

> So after *Branti*, the test is whether party affiliation is appropriate requirement for effective job performance. Jobs requiring party affiliation for effective job performance may or may not be of the policy making or confidential variety. That is, between the strictly menial government worker (who under *Elrod and Branti*, is clearly and completely protected from patronage firing) and the policy maker/confidential assistant (whose protection from patronage firing is nonexistent) there is a range of government positions for which the propriety of patronage firing has depended largely on the court's juggling of competing constitutional and political values. The results have not been consistent.

The failure of the courts to develop and apply a consistent set of principles concerning patronage dismissals creates a context in which [county employees and employers] can have no clear understanding as to whether a plaintiff employee is constitutionally protected from being fired just because of political affiliation. The lack of clarity on the above issue warrants this court's granting of the Petition for Certiorari.

With respect to Mineer's claim that Judge Call's conduct was violative of the due process clause of the Fourteenth Amendment, the Sixth Circuit erroneously concluded that Mineer had no property right to his continued employment. As set forth in the statement of the case, on January 8, 1990, Mineer had two more years to serve on a four year term of employment. This four year term resulted from the former Judge/Executive Owens' nomination of Mineer who filled the post of Road Supervisor in May, 1989, and the fiscal court's ratification

of a four year term retroactively beginning in January, 1988, to extend to January, 1992.

Judge/Executive Call argued for qualified immunity on the basis that it was not clearly established that Mineer's term did not terminate as a matter of law on January, 1990. Primarily he relied upon the case of *Christian v Belcher*, Supra, wherein the Sixth Circuit, interpreting Kentucky law, held that the terms of all county employees expire automatically at the end of each executive administration. *Christian*, 888 F.2d at 414-15. In this case, however, the Sixth Circuit failed to defer to the applicable Kentucky statutes regarding county road supervisors. Specifically K.R.S. 179.020(7) provides an exception to the general principle that all terms expire automatically at the end of each executive administration. The statute provides that the period for employment for any county road supervisor shall be either two or four years to begin on the second Tuesday in January of an even numbered year. There is no requirement that the term begin at the beginning of the term of a magistrate or the beginning of the term of a county judge/executive.

The Judge/Executive relied upon Kentucky Attorney General opinion 78-4302 in support of the general proposition that a fiscal court may not enter into contracts which extend beyond its own term. However, that opinion clearly states that this is not absolute and that if a particular statute confers the power to contract beyond the fiscal court's term, then the statute would govern. K.R.S. 179.020 is such a statute. For the above

reasons, Mineer had a clearly established property right to the final two years of his four year term of employment and because he was deprived of these without the pretermination process as set out in the Kentucky Revised Statutes, the Sixth Circuit Court of Appeals was in error in granting Judge/Executive Call's qualified immunity as to the Fourteenth Amendment due process claim as well as the First Amendment claim.

II. The Sixth Circuit Court of Appeals erroneously granted the members of the fiscal court qualified immunity when they, in conjunction with the Judge/Executive, terminated Mineer in violation of his Fourteenth and First Amendment rights.

The Sixth Circuit through Judge Churchill's opinion, held that the members of the fiscal court did not have the legal capacity to deprive Mineer of constitutional rights by terminating him. He opined that the sole power of removal of county road supervisors was vested in the Judge/Executive and that the fiscal court would not have played a role had Judge/Executive Call followed the statute in removing Mineer.

K.R.S. 179.020 provides that the duties of a county road engineer shall be performed by a county road supervisor who shall be employed by the County Judge/Executive with the consent of the fiscal court and he may be removed in the same manner provided for county road engineers. K.R.S. 179.060 allows a County

Judge/Executive to remove a road supervisor for incompetence, malfeasance or misfeasance after giving written charges and a hearing.

According to its minutes, the fiscal court received Mineer's nomination in 1989 and voted to employ him for a four year term retroactive to the second Tuesday of January, 1988. This resolution was passed by a 5 to 1 vote. Then in January, 1990, after Judge/Executive Call took office, the magistrates of the fiscal court went into executive session in their first meeting under the new judge and then emerged from the meeting adopting a resolution nullifying the contract they had with Bill Mineer. They then immediately adopted another resolution to employ James Watkins as road supervisor to fill the vacancy now left in that post.

The magistrates were acting in their official capacities when they voted for the resolution to nullify the contract between the Fleming County Fiscal Court and County Road Supervisor Bill Mineer. They were also acting in their official capacity when they voted for the resolution to appoint James Watkins to the post. The action of the fiscal court was clearly improper. K.R.S. 179.060 provides how a county road supervisor may be removed. Neither Judge Call nor the magistrates took any steps to follow the statutory procedure for the removal of county road supervisor. Furthermore, the Sixth Circuit Court of Appeals, in a footnote to Judge Churchill's portion of the opinion, recognized in an annotation to the Kentucky removal statute, K.R.S. 179.060, that it had been amended by K.R.S. 67.710(7)

by implication so that the County Judge/ Executive exercises his authority to remove county personnel with the *approval* of the fiscal court. Thus, under Kentucky law, the magistrates did have the capacity to terminate Mineer. In fact, the record shows that they, in conjunction with Judge/Executive Call, did terminate Mineer without cause in violation of his clearly established constitutional rights. For these reasons, the Sixth Circuit was in error when they failed to reverse the District Court's grant of qualified immunity to the magistrates.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted

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APPENDIX A

92-5368

UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT COURT

FILED MAY 4 1993
LEONARD GREEN, Clerk

WILLIAM MINEER
Plaintiff-Appellee

V.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

JEWELL CALL, FLEMING COUNTY JUDGE/ EXECUTIVE; MAGISTRATE GARY C. HARMON; MAGISTRATE ANDY COLE; MAGISTRATE RONNIE CARPENTER; MAGISTRATE WILLIAM THOMPSON; MAGISTRATE L.C. CORD. in Their Individual Capacities,

Defendants-Appellants

JEWELL CALL, FLEMING COUNTY JUDGE/ EXECUTIVE; MAGISTRATE GARY C. HARMON; MAGISTRATE ANDY COLE; MAGISTRATE RONNIE CARPENTER; MAGISTRATE WILLIAM THOMPSON; MAGISTRATE L.C. CORD. in Their Official Capacities, FLEMING COUNTY FISCAL COURT; FLEMINSBURG, KENTUCKY,

Defendants.

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This section is to be prominantly displayed if this decision is reproduced.

Before: GUY and RYAN, Circuit Judges; and CHURCHILL, Senior District Judge.*

JAMES P. CHURCHILL, Senior District Judge, delivered the opinion of the Court. GUY, circuit judge, delivered a separate opinion, concurring in part and dissenting in part, in which RYAN, circuit judge, concurred.

William Mineer was employed by Fleming County, Kentucky, as road supervisor from 1978 until January 8, 1990 when his employment was effectively terminated by actions of the Fleming County Judge/Executive *and/or* the Fleming County Fiscal Court.

Mineer commenced this lawsuit in the United States District Court for the Eastern District of Kentucky for injunctive relief and damages for constitutional violations pursuant to 42 U.S.C. § 1983. His complaint also includes state law claims.

The defendants are Fleming County, the Fleming County Fiscal Court, Jewell Call as Fleming County Judge/Executive in his individual and official capacities, and six named fiscal court magistrates. All of the magistrates are sued in their official capacities as members of the fiscal court. All of them except one, John Sims, are also sued in their individual capacities.

It is Mineer's position that the term of his employment was for four years from the second Tuesday of

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* Honorable James P. Churchill, United States District Court for the Eastern District of Michigan, sitting by designation.

January 1988, and that the termination of his employment without a predeprivation hearing in the middle of his term denied him procedural due process under the Fourteenth Amendment. He further asserts that the actions of the defendants were in retaliation for his political activity in violation of the First Amendment.[1]

The plaintiff's state law claims are for violation of Ky. Rev. Stat. Ann. ("K.R.S.") §§ 179.020 and 179.060.

From their briefs, it appears that the defendants denied the plaintiff's allegations generally and that the individual defendants also pleaded the affirmative defense of qualified immunity with respect to the federal claims.

Following the close of discovery, the defendants filed a motion for summary judgment as to all claims. Call and the five magistrates who were sued in their individual capacities also sought summary judgment on the qualified immunity issue.

The District Court granted the magistrates' motion as to "Plaintiff's claims based on his First Amendment and State Law claims for wrongful discharge." In all other respects, the defendants' motion for summary judgment was denied.

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[1] The plaintiff also claims that his termination violated the Fifth Amendment, but he does not explain how the Fifth Amendment was implicated.

Call and all six magistrates[2] filed a notice of appeal in their individual capacities from the order denying their motion for summary judgment on the issue of qualified immunity. The individual defendants appeal denial of the summary judgment motion for qualified immunity as a matter of right. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

The appellants have asked the Court to exercise pendent appellate jurisdiction with respect to other state and federal issues. We decline to do so although we realize that our decision on the qualified immunity issue will impact other issues.

The Relevant Statutes

Kentucky statutes concerning county road supervisors and county judge/executives are central to the issues on appeal.

The position of County Road Supervisor is created by statute, K.R.S. § 179.020.

The statute directs that if the fiscal court does not provide for a county road engineer, the duties of the county road engineer shall be performed by a county road supervisor who shall be employed by the county

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[2] It is not clear why magistrate John Sims filed a notice of appeal from the order denying qualified immunity. Because he was not sued in his individual capacity, the defense of qualified immunity was not available to him.

judge/executive with the consent of the fiscal court. In order to qualify for the position as a county road supervisor, the candidate must meet the following requirements:

> (a) He has at least three (3) years' practical road building experience of a nature satisfactory to examining authorities selected by the bureau of highways for the Commonwealth of Kentucky, and
>
> (b) He has passed an examination, either oral or written, or both, given by the examining authorities, and has received a certificate of qualification from the authorities.

The statute also provides that the period of employment for any county road supervisor shall be two (2) or four (4) years, in the discretion of the fiscal court, beginning with the second Tuesday in January of an even-numbered year.

The statute also provides that a county road supervisor "may be removed in the same manner provided for county road engineers."

K.R.S. § 179.060, entitled "Removal of engineer — Filling of Vacancy," reads in its entirety as follows:

> (1) The county judge/executive may remove the county engineer, appointed under KRS 179.020, at any time for incompetency, malfeasance or misfeasance in office upon written charges after a hearing of which ten (10) days' notice shall be given by serving a copy of the charges upon the county engineer. The hearing shall be at the courthouse, in the county seat.

(2) If upon the hearing the charges are sustained, the county judge/executive shall remove the county engineer and immediately notify him by mail of his removal. The notice shall state specifically the grounds for removal. The record of the proceedings shall be filed in the office of the county clerk.

(3) Within ten (10) days after the removal, the county judge/executive, with the consent of the fiscal court, shall appoint a county engineer to fill the vacancy caused by the removal. The person so appointed shall hold office for the unexpired term or until a final order of a court of competent jurisdiction determines that the original county engineer was wrongfully and illegally removed and directs his reinstatement.

K.R.S. § 67.710 provides that the county judge/executive shall be the chief executive of the county. The statute provides that his responsibilities shall include "exercis[ing] with the approval of the fiscal court the authority to appoint, supervise, suspend, and remove county personnel (unless otherwise provided by state law)."

Facts Concerning Mineer's Employment

Prior to the second Tuesday of January 1988, Mineer had completed successive four and two year terms. In January 1988, the county judge/executive submitted Mineer's name for another term, but the nomination was disapproved by the fiscal court. He stayed on as de facto county road supervisor until August of 1989 when County Judge/Executive Owens again submitted Mineer's name to the fiscal court.

The minutes of a regular meeting of the fiscal court held on August 14, 1989 contain the following entry:

> Motion by John, seconded by Ernie, to hire Bill Mineer as Co. Rd. Supervisor for 4 years, retroactive to 2nd Tues. of 1988, whereby the Court failed to hire him in Jan. of 1988, and whereas it was reviewed and brought to the Court's attention, and pursuant to K.R.S. 179-020, hereby being resolved by the above hiring action.

Magistrate Cord testified that the county attorney was at the meeting and told the fiscal court that Mineer's term would be two years because one court could not bind the next.

Facts and Allegations Concerning Termination of Mineer's Employment

The parties and the District Court all assume that Mineer lost his employment on January 8, 1990 so we proceed on the same assumption. The record on appeal leaves something to be desired concerning Judge Call's role in the termination.

Mineer's complaint contains the general allegation that he was wrongfully discharged "by the actions of the *defendants* herein in their official and individual capacity [sic] on or about the 8th day of January, 1990." (emphasis added.)

The appellants' brief contains three different versions of the event. One version is that the term of Mineer's employment expired as a matter of law on the second Tuesday of January 1990 because one fiscal

court could not bind the next. Under this version he was not fired. He just was not rehired. Another version is that the fiscal court voted to rescind his four year contract and thereafter Judge Call decided to nominate his own appointee. The third version espoused in the brief is that the court decided not to ratify his contract.

The January 8, 1990 minutes of the fiscal court contain the following reference to Mineer:

> Motion by John Sims, second by L.C. Cord, Jr., to go into Executive Session to discuss personnel.
>
> Vote Unam.
>
> Court came out of Exec. Session
>
> Motion by Bill Thompson, seconded by Andy Cole, to nullify present Contract with Rd. Supervisor Bill Mineer, (entered into 8-14-89 for 4 years), as this Court doesn't feel bound by previous Court's motion of a Contract past their [sic] term, thereby creating a vacancy at the end of 1-8-90 workday.
>
> Yes: Ronnie, Garey and L.C.
>
> Nay: John
>
> Motion Carried.

The minutes disclose that "Bill" and "Andy" were at the meeting, but they apparently did not vote on this resolution. The motion was treated as carried although it had the affirmative vote of only three magistrates in a meeting attended by six magistrates and presided over by the county judge/executive.

The minutes show that the next item of business was Judge Call's recommendation that Bill Gulley fill

the vacancy on a temporary basis. Lacking support, Call withdrew the recommendation. The fiscal court then unanimously accepted Judge Call's recommendation that James Watkins be appointed to fill the vacancy on a temporary basis.

Judge Call has testified that he did not fire Mineer; he just did not hire him.

Judge Call presided at the meeting.

There is no direct evidence that Judge Call asked the fiscal court to take any action on January 8, 1990 concerning the county road supervisor position. There is unrefuted evidence, however, that before Call took office on January 2, 1990 he intended to appoint someone other than Mineer and that between January 2, 1990 and January 8, 1990, Call informed Mineer that he intended to let Mineer go if he could do so.

From this record, it is clear that if Mineer was discharged on January 8, 1990 he was discharged by Judge Call. Whether he was lawfully discharged or not, his ability to perform his duties was taken from him on January 8, 1990 with the approval of three magistrates and with no action to prevent it by the county judge/executive and the two other magistrates.

The District Court's Rationale

In ruling in favor of the magistrate defendants' motion for summary judgment on Mineer's First Amendment and state law claims and in denying the motions for summary judgment on the Fourth Amendment due

process claims, the District Court relied on *Christian v. Belcher*, 888 F.2d 410 (6th Cir. 1989).

The *Christian* court approved a ruling by the district court that under Kentucky law, the terms of all county employees expire automatically at the end of each executive administration and that it was necessary to reappoint the county flood administrator. The court further ruled that, under the circumstances of that case, the failure to do so constituted a constructive discharge. The court also ruled that the fiscal court magistrates were entitled to summary judgment on the First Amendment claims because the magistrates had no appointment authority. The court nevertheless reversed a district court grant of summary judgment on Christian's Fourteenth Amendment due process claim.

Christian is similar to this case in some respects, but is distinguishable in others. In *Christian*, the plaintiff was a county flood plain administrator whose appointment and removal was governed by K.R.S. § 67.710 rather than a county road supervisor whose appointment and removal was governed by K.R.S. §§ 179.020 179.060. Upon learning that he would not be reappointed by a newly elected county judge/executive, Christian sent a letter to the judge and fiscal court requesting a hearing, which request was denied. Here, Mineer never requested a hearing.

There is one other distinction between *Christian* and this case on appeal. Here the Court is directly concerned with qualified immunity only.

The Magistrates' Claim of Qualified Immunity

The general provisions concerning powers and responsibilities of county chief executive are set forth in K.R.S. § 67.710. They apply to the appointment and removal of county personnel except as otherwise provided by law. The law with respect to the appointment and removal of county road supervisors is "otherwise provided" in K.R.S. §§ 179.020 and 179.060

The powers and authority of county judge/executives and fiscal courts with respect to the appointment and removal of county road supervisors are spelled out in Kentucky statutes in a manner relatively free from ambiguity.

The fiscal court has a limited discretion to determine the term of employment of a county road supervisor. The term can be for two years or for four years and must always expire on the second Tuesday of an even numbered year.

The county judge/executive appoints county road supervisors. The appointment of a county road supervisor must have the consent of the fiscal court.

During a county road supervisor's terms, he can be removed for cause and only for cause. Cause for removal includes incompetency, malfeasance or misfeasance in office.

Only the county judge/executive has the authority to remove a county road supervisor. To lawfully remove a county road supervisor, the county judge/executive must follow a carefully specified procedure which in-

cludes written charges and a hearing at the courthouse after ten days' written notice. K.R.S. § 179.060(1).

If, and only if, the charges are sustained at the hearing, may a county judge/executive remove the county road supervisor.

It is a reasonable construction of the statute that the fiscal court would not be involved in the removal hearing.[3]

It is also reasonable to construe § 179.060 concerning the conditional appointment of a successor as applying to county road supervisors as well as to county engineers.

Applying the law to the undisputed facts of this case, the members of the fiscal court did not have the legal capacity to deprive Mineer of constitutional rights in connection with his termination.

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[3] An annotation to K.R.S. § 179.060 contains the following entry:

> KRS 179.060 provides, in effect, pursuant to subsection (2) of this section, that the county judge/executive can remove a county road supervisor, without the consent of the fiscal court. However, it can be said that KRS 67.710(7) amended KRS 179.060 by implication, and KRS 67.710(7) requires the county judge/executive to exercise his authority to remove county personnel with the approval of the fiscal court. OAG 84-205.

Since the county judge/executive did not initiate the removal procedures spelled out by K.R.S. § 179.060 we need not determine whether the statutory hearing would be conducted by the fiscal court or by the county judge/executive.

The sole power of removal was vested in the county's chief executive office. As a matter of law, it is doubtful that the fiscal court would have played a role had Judge Call followed the statute in removing Mineer. Call did not initiate removal proceedings. The fiscal court had no authority to conduct a hearing.

We, therefore, conclude that the magistrates' motion for summary judgment on qualified immunity should have been granted with respect to the Fourteenth Amendment procedural due process claim as well as with respect to the First Amendment claim.

The County Judge/Executive's Claim of Qualified Immunity

As a matter of law, it was County Judge/Executive Call who had the authority to initiate proceedings to remove Mineer from his employment. As a matter of law, the fact that Mineer was effectively fired was Call's responsibility.

On the record before the Court there are fact questions concerning Call's motives for terminating Mineer's employment. Call may have terminated Mineer in retaliation for political activity. He may have terminated him for incompetence. These fact questions, however, are irrelevant if Call had qualified immunity for his conduct, and they are likewise irrelevant in resolving the issue of qualified immunity.

The relevant inquiry focuses on whether a reasonable official in the defendant's position could have be-

lieved his conduct did not violate clearly established statutory or constitutional rights. In determining whether qualified immunity attaches, the focus is on the state of the law as it existed when the defendant took his challenged action. See, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Anderson v. Creighton*, 483 U.S. 635 (1987).

I. Fourteenth Amendment Procedural Due Process Claim

Mineer's claim under 42 U.S.C. § 1983 that Judge Call's conduct was violative of the Due Process Clause of the Fourteenth Amendment is dependent upon two conditions: 1) that he had a property right to continued employment and 2) that its deprivation was without due process of law.

A. *Property Right*

For reasons set forth above we conclude that on January 8, 1990, Mineer had two more years to serve on a four year term of employment and that his expectation of continued employment was a property right within the meaning of the Fourteenth Amendment.

Call raises several arguments to support the proposition that on January 8, 1990, it was not clearly established that Mineer's term did not terminate as a matter of law on that date.

One argument is based upon an opinion by the state attorney general. OAG 78-432 supports the general proposition that a fiscal court may not enter into contracts which extend beyond its own term. The opinion

clearly states, however, that this is not an absolute principle: "there is one basic exception to this general principle.... It is that if a particular statute conferring the power to contract clearly authorizes the fiscal court to make a contract extending beyond its own term, the statute would govern ...." OAG 78-432. We find that § 179.020 clearly allows the fiscal court to authorize four year terms of employment for county road supervisors.

The county attorney's stated opinion at the August 14, 1989 meeting of the Fiscal Court was based upon OAG 78-432. There are circumstances in which reliance on the advice of counsel may support a claim of qualified immunity. See, e.g., *V-1 Oil Co. v. Wyoming*, 902 F.2d 1482 (10th Cir. 1990) ("reliance on advice of counsel in certain circumstances rises to the level of extraordinary circumstances"). In this case, Judge Call cannot reasonably claim that he relied on the county attorney's opinion because he was not in office when the county attorney expressed his opinion nor is there anything in the record to suggest reliance.

Call's primary argument is based upon *Christian v. Belcher*, wherein another panel of this court, while affirming the district court's grant of summary judgment, stated:

> Moreover, as noted earlier, the district court expressly held that under Kentucky law, the terms of all county employees expire automatically at the end of each executive administration, and that '[a]fter Belcher was elected, [Christian] had to be reappointed to the job of [FPA].' Since we have found no Kentucky authority to the contrary, we

> defer to the experienced district judge's interpretation of the law of the state in which he sits.

Christian, 888 F.2d at 414-15.

This language however, has no application to a county road supervisor because § 179.020(7) provides an exception to the general principle that all terms expire automatically at the end of each executive administration. An appointment to a four year term necessarily extends beyond the executive administration in existence at the time of the appointment.

We, therefore, conclude that Mineer's property right in his four year term of employment was clearly established. All one had to do to reach this conclusion was to read the applicable statutes.

B. *The Process Due*

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), and its progeny define the pretermination process which is due. The Kentucky statute provides adequate process to satisfy the Fourteenth Amendment if followed. Here there was no pretense to follow the statutory procedures for terminating Mineer. Judge Call cannot claim qualified immunity because he totally disregarded clearly established procedures set forth by statute.

II. First Amendment Claim

Whatever the law may have been with respect to patronage hiring at the time Judge Call took the challenged action, there is no authority for the proposition that

political factors justify a decision to terminate an employee during the course of that employee's statutorily defined term of employment.

CONCLUSION

The District court's denial of the magistrates' motion for summary judgment on the Fourteenth Amendment due process issue is REVERSED.

The district court's denial of the county judge/executive's motion for summary judgment on the qualified immunity issue should be AFFIRMED.

No. 92-5368

Mineer v. Fleming County, et al.

RALPH B. GUY, JR., concurring in part and dissenting In part. I concur in that portion of the court's opinion which grants qualified immunity to the magistrates with respect to the Fourteenth Amendment procedural due process claim and affirms the trial court's grant of qualified immunity to the magistrates with respect to the First Amendment claim. I dissent on the qualified immunity issue as it relates to the county executive. I would grant qualified immunity to him on both the Fourteenth and First Amendment claims.

I.

To prove a violation of procedural due process, a plaintiff must demonstrate that he was deprived of a constitutionally protected liberty or property interest and that federal due process requirements were disregarded. *Lee v. Western Reserve Psychiatric Habilitation Center*, 747 F.2d 1062, 1067 (6th Cir. 1984). An employee may demonstrate a protected property interest in continued employment by showing an express or implied state law basis for that interest. *Bishop v. Wood*, 426 U.S. 341, 344-45 (1976). In at least one instance, the Supreme Court has held that a non-tenured state employee may prove such an interest by showing that the policies and practices of the employer Justified his legitimate claim of entitlement to continued employment. *Perry v. Sinderman*, 408 U.S. 593, 602-03 (1972). Thus, the first question in this case is whether a reason-

able official in Call's position could have believed that Mineer did not have a protectible property interest in his employment.

In order to resolve this issue, it is important to determine whether Mineer actually had an ongoing employment contract or whether his term of office expired with that of the outgoing fiscal court and county executive. If Mineer had a clear right to his position as road supervisor for four years beginning on January 8, 1988, then Call's treatment of Mineer could be actionable. If, as Call alleges, Mineer's term of office expired contemporaneously with that of the administration that hired him, Mineer had no clearly established property interest in his further employment,[1] and qualified immunity would shield Call from Mineer's procedural due process claim.

The resolution of this issue turns on the proper construction of Kentucky law. In *Christian v. Belcher*, 888 F.2d 410 (6th Cir. 1988), this court concluded that under Kentucky law the terms of all county employees expire automatically at the end of each executive administration. *Id.* at 414. Mineer does not respond directly to *Christian*'s conclusion in his brief; rather, he

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[1] For qualified immunity purposes, Call need only demonstrate that Kentucky law remained unclear regarding the terms of county road supervisors at the time of Mineer's dismissal. If reasonable county officials could disagree on this issue, immunity should attach. *Guercio v. Brody*, 911 F.2d 1179, 1185 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1681 (1991).

contends that the fiscal court which appointed him to a four-year term did so in furtherance of the plain meaning of Kentucky law. Citing Kentucky Revised Statutes Annotated § 179.020(7), which provides that the term of office of a county road supervisor will be either two or four years at the discretion of the fiscal court, Mineer argues that the fiscal court simply followed its statutory mandate when it appointed him to a four-year term retroactive to January 8, 1988. Thus, Mineer's contention by implication is that the *Christian* conclusion applies only where no specific term of office exists. Under Mineer's construction of Kentucky law, then, only non-civil service employees appointed without a specific term of office are subject to the *Christian* rule that employees' terms expire at the conclusion of an administration's term in office.

I find Mineer's reading of the statute unpersuasive. The conclusion of this court in *Christian* that the terms of non-civil service employees expire contemporaneously with that of the outgoing administration remains the most commonsensical reading of the applicable Kentucky law. *See* OAG 82-63 (absent a merit system, county employees — including the county road supervisor — under a previous administration automatically lose their jobs at the beginning of the new administration); OAG 82-22 (present fiscal court may not bind fiscal court coming into office in January 1982, with a contract for a county road supervisor; appointee could only fill out the remainder of the term ending on the second Tuesday of January 1982). Kentucky Revised

Statutes Annotated § 179.020(7) has much less relevance than Mineer attempts to give it. The statute gives the county executive the power to employ a county road engineer or supervisor with the consent of the fiscal court. *See* OAG 82-142. Both the county executive and the fiscal court magistrates serve four-year terms. Ky. Rev. Stat. Ann. § 67.050 (magistrates); Ky. Rev. Stat. Ann. § 67.700 (county executive). Thus, the statute serves only to give the county executive and the magistrates the flexibility to make either one or two supervisor appointments during their terms. The fiscal court can consent to the county executive's selection of a road supervisor for a two-year appointment, allowing the fiscal court and the county executive the opportunity to re-think their decision in the middle of their four-year terms, or they can select a road supervisor for their entire terms.

A coherent reading of the entire statute compels the conclusion that a road supervisor cannot serve a two-year term and then receive a four-year appointment, as was attempted by the incumbents in this case. Under section 179.020(7), a county road supervisor's period of employment begins with the second Tuesday in January of an even-numbered year. Importantly, beginning with the November 1977 election, county executives' terms of office began on the first Monday in January of the following year. *See* Ky. Rev. Stat. Ann. § 67.700. Thus, as four-year officeholders, county executives like Call would necessarily begin their terms on even-numbered years. The fact that the terms of county executives

and road supervisors parallel each other is significant, for it suggests that section 179.020(7) allows a road supervisor to serve consecutive two-year terms or one four-year term. *See* OAG 82-22 (incoming county executive, with consent of fiscal court, must appoint a county road supervisor whose term will begin the second Tuesday of January 1982, and will end as of the second Tuesday of 1984, unless another two-year term is desired; otherwise, the road supervisor's term would end on the second Tuesday in January of 1986).

To read the statute otherwise would allow the absurdity that has developed in this case — lame duck magistrates and county executives could appoint officers to terms of office which would bind succeeding popularly-elected administrations. Such a thwarting of the majority will is not commanded by Kentucky law. Mineer did not have a valid contract which extended his term in office beyond January 1990. Thus, Call acted reasonably in determining that it was lawful to conclude that Mineer did not have a cognizable property interest, and he is therefore entitled to qualified immunity.

The district court, relying on *Christian*, found a material issue of fact remained as to whether Mineer had an expectation of continued employment based upon the fact that all other county employees were allowed to maintain their jobs despite the change in administration. *See Christian*, 888 F.2d at 417 (finding a genuine issue as to whether plaintiff had a legitimate claim of entitlement to continued employment when "during [the applicable] time period [plaintiff] was the

only county employee not to be reappointed to his job upon a change in administration"). This conclusion is relevant to the merits of Mineer's underlying procedural due process claim. But whether Mineer ultimately had a protectible property interest matters not to the question of whether Call acted reasonably in concluding that Mineer did not have a protectible property interest.

I do not focus, as did the district court, on whether Call reasonably should have known of Mineer's right to notice and a hearing. Framing the issue in that way implicitly decides that Mineer did in fact have a protectible property interest in his employment which required notice and a hearing. Having found that Call reasonably concluded that Mineer did not have a protectible property interest, I would not reach the question of notice and hearing.

II.

Having concluded that Mineer did not have a valid contract which extended beyond January 1990, I next consider whether Call's politically motivated decision not to rehire Mineer violated clearly established First Amendment rights of Mineer. When considering politically motivated employment decisions, we normally do not distinguish between dismissals and decisions not to rehire. *See id.* at 416 (treating termination and failure to rehire as indistinguishable for First Amendment purposes). Thus, Call correctly characterizes this as a "failure to rehire"/constructive discharge case.

Call asserts that at the time of Mineer's dismissal in early 1990 the law was insufficiently developed, thereby entitling Call to qualified immunity because he acted in an objectively reasonable manner. See *Malley v. Briggs*, 475 U.S. 335, 341 (1986). I agree. In January 1990, First Amendment law did not clearly establish that a county executive could not refuse to rehire county road supervisors for politically motivated reasons.

In early 1990, the relevant case law on politically motivated personnel decisions included *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976); *Christian v. Belcher*, 888 F.2d 410 (6th Cir. 1989); and *Balogh v. Charron*, 855 F.2d 356 (6th Cir. 1988). Plaintiff relies particularly on *Elrod*, *Branti*, and *Christian* to support his contention that the law clearly establishes that county road supervisors may not be dismissed from office for political reasons.

The Supreme Court first considered politically motivated personnel decisions in *Elrod*. A plurality of the Court concluded that a governmental unit violated the First Amendment when it installed a traditional patronage system of government employment. The plurality noted, however, that government has a vital interest in ensuring that "representative government not be undercut by tactics obstructing the implementation of policies of the new administration." *Elrod*, 427 U.S. at 367. Thus, confidential employees in policymaking positions could be dismissed for political reasons. *Id.* at 372. Justice Stewart's limiting concurrence, which provided the critical fifth vote in *Elrod*, held that a

"nonpolicymaking, nonconfidential government employee can[not] be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs." *Id.* at 375 (Stewart, J., concurring).

In an affirmation of *Elrod*, the Court in *Branti* clarified the latitude government officials enjoy in making personnel decisions. Importantly for our purposes, the Court noted that "it is not always easy to determine whether a position is one in which political affiliation is a legitimate factor to be considered." *Branti*, 445 U.S. at 518 (quoting *Elrod*, 427 U.S. at 367). It then reformulated the inquiry by abandoning the labels "policymaker" or "confidential employee" in favor of asking "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. Then, the Court held that the continued employment of an assistant public defender could not be conditioned on political affiliation. *Id.* at 519.

At the time of Mineer's dismissal, the Sixth Circuit's contribution to this area of the law included three cases which discussed the propriety of political firings and hirings. In *Balogh*, this court held that a trial judge bailiff was a "confidential employee" whose discharge, allegedly because he supported the judge's opponent in an earlier judicial election, did not violate the First Amendment. The court emphasized that as a judicial aide the bailiff handled sensitive communications, acted as the Judge's bodyguard, and learned the outcome of

cases prior to the publication of those decisions. The function of the job, then, subjected the bailiff to politically-motivated discharge.

In *Christian v. Belcher*, a former county flood plain administrator and building inspector brought an action against the county executive and fiscal court magistrates arising out of their failure to rehire him after the election of a new county executive. The district court granted summary judgment to all defendants, and this court remanded the case for further proceedings based on our conclusion that genuine issues of material fact existed as to whether the former administrator was dismissed for political reasons and whether party affiliation was an appropriate requirement for his position. 888 F.2d at 415-16. In *Belcher*, the court addressed the merits of whether the former administrator's dismissal had been proper. The issue of qualified immunity was never considered.

In summarizing the state of the law on the issue of politically motivated personnel decisions, this court in a later case characterized the law as "unsettled." In *Cagle v. Gilley*, 957 F.2d 1347, 1349 (6th Cir. 1992). *Cagle* is directly relevant to the resolution of Call's qualified immunity issue. In *Cagle*, we reversed a district court's denial of summary judgment to a sheriff who had failed to rehire former deputies allegedly due to their election support of an opponent. Concluding that "any sheriff of reasonable competence in [defendant]'s position, measured objectively, would [not] have clearly understood that he was under an affirmative duty to have refrained

from refusing to reappoint the deputies in August and September, 1988[,]" *id.*, at 1349, this court found that the sheriff was entitled to qualified immunity.

These cases support Call's contention that he is entitled to qualified immunity on Mineer's First Amendment claim. In addition to the cases already cited, which constituted the law at the time of Mineer's dismissal, this court in recent years has held that a wide variety of public officials do not enjoy the right to be free from patronage dismissal. *See, e.g., Monks v. Marlinga*, 923 F.2d 423 (6th Cir. 1990) (city prosecutor); and *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990) (city attorney). Whatever the ultimate merits of Mineer's claim, it cannot be said that he had a clearly established right as a county road supervisor to be free from a politically motivated dismissal.[2]

---

[2] If it *were* clearly established that political considerations were not an appropriate job requirement for the position of county road supervisor, then the only jury question, *in this case*, would be whether the defendant's dismissal of plaintiff was motivated solely by politics. Qualified immunity is not a jury issue.

APPENDIX B

93-6046

UNITED STATES COURT OF APPEALS FOR THE SIXTH DISTRICT COURT

FILED SEPT. 3 1993
LEONARD GREEN, Clerk
AT LEXINGTON
LESLIE G. WHITMER
CLERK: U.S. DISTRICT COURT

In Re: JEWELL CALL, individually and in his official capacity as Fleming Couny Judge/Executive	))))	**ORDER**

Petitioner

BEFORE: GUY and RYAN, Circuit Judges; and CHURCHILL, Senior District Judge.*

The petitioner seeks a writ of mandamus directing the district court to enforce this court's mandate by dismissing the complaint with prejudice. The district court judge has indicated that he does not intend to respond.

---

* The Honorable James P. Churchill, United States District Court for the Eastern District of Michigan, sitting by designation.

This petition arises following our opinion in *Mineer v. Call,* Sixth Circuit No. 92-5368 (May 4, 1993) (unpublished). In that case, the defendants appealed the district court's denial of qualified immunity. The defendants included six fiscal court magistrates and the petitioner, a county judge/executive. Following the issuance of this court's mandate, the district court dismissed the six fiscal court magistrates on grounds of qualified immunity, but did not dismiss the petitioner. The district court judge based his decision on the *Mineer* opinion.

The opening paragraph of our prior opinion stated that Judge Churchill delivered the opinion of the court and that Judge Guy delivered a separate opinion, concurring in part and dissenting in part, in which Judge Ryan concurred. Judge Churchill's opinion concluded that the denial of summary judgement was reversed as to the six magistrates, but affirmed as to the petitioner. However, Judge Guy's opinion dissented as to the petitioner and stated that he would grant the petitioner qualified immunity. Judge Ryan concurred in that opinion, and that concurrence effectively makes Judge Guy's opinion the majority opinion as to the petitioner. Therefore, Judge Churchill's opinion expresses the majority result with respect to magistrates, but Judge Guy's opinion, even though written as a dissent, states this court's conclusions with respect to the petitioner. this clarification should eliminate any confusion arising from the prior opinion.

It therefore is ORDERED that the district court take all appropriate steps to enforce our mandate as stated above. In view of this clarification, it is ORDERED that the petition for a writ of mandamus is dismissed.

ENTERED BY ORDER OF THIS COURT

/s/ Leonard Green, Clerk

A TRUE COPY

Attest: Leonard Green, Clerk

By: /s/ Chris Lawhorn, Deputy Clerk.

APPENDIX C

Eastern District of Kentucky
Filed: Mar 4 1992
At Lexington
Leslie G. Whitmer, Clerk
U.S. District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 91-4

WILLIAM MINEER, PLAINTIFF

V. **MEMORANDUM OPINION**

FLEMING COUNTY, ET. AL., DEFENDANT

* * * * *

I. INTRODUCTION

This matter is before the court on the Motion of the Defendants for Summary Judgment. The Plaintiff has filed a Reply and the Defendants have responded to that Reply and the matter is therefore fully briefed and ripe for review by the Court.

II. FACTUAL BACKGROUND

Plaintiff William Mineer was formerly the Fleming County (Kentucky) Road Supervisor. The name Defendants are as follows: Fleming County; Fleming County Fiscal Court; Jewell Call, Fleming County Judge/Executive; and Fleming County Magistrates Gary C.

Harmon, Andy Cole, John Sims, Ronnie Carpenter, William Thompson and L.C. Cord.

In early 1990, Mineer lost his position as road supervisor when a new Fiscal Court, composed of the named Magistrates, voted not to ratify his appointment by the former Fiscal Court.

III. TYPE OF ACTION

Mineer brings this action pursuant to 42 U.S.C. §§ 1983, 1985 and 1988, alleging that the Fleming County Fiscal Court and Judge Executive acted in violation of his First, Fifth and Fourteenth Amendment rights under the United States Constitution in discharging him from his office. He alleges that his removal from office was politically motivated punishment for the exercise of his constitutional rights.

Mineer contends that his constitutional right of due process was violated by the Defendants' failure to afford him notice and a hearing prior to his dismissal. He also alleges claims under KRS 179.020 and KRS 179.060 and a wrongful discharge cause of action under Kentucky common law.

IV. UNDISPUTED FACTS

In 1978, Mineer was recommended for the post of Fleming County Road Supervisor by then-Fleming County Judge/Executive Bill Owens ("Owens"). In July of 1978, Mineer's appointment was ratified by the Fiscal Court and he assumed the post for a term to expire in January of 1982. In January of 1982, Owens again

forwarded Mineer's name to the Fiscal Court for approval as county road supervisor and the Fiscal Court ratified this appointment for a term to expire in January of 1986.

In January of 1986, Owens again requested the Fiscal Court to ratify Mineer as road supervisor, however, the magistrates voted 5-1 against his reappointment. Mineer continued to hold the position as road supervisor and another vote was taken on his nomination in February of 1986. The tally again resulted in a 5 to 1 vote against his reappointment. Mineer continued to work until September of 1986 when another ballot was taken by the Fiscal Court resulting in a tie vote of 3-3. Owens broke the tie and Mineer was reappointed for a two year term which retroactively began in January of 1986, expiring in January of 1988.

Mineer continued to work as road supervisor after January 1988, despite Owens' failure to submit his name to the Fiscal Court for approval. In May of 1989, Owens lost the primary election for County Judge/Executive to current Fleming County Judge/Executive Jewell Call ("Call"). While still in office but after losing the primary, Owens resubmitted Mineer's name to the Fiscal Court for the post of road supervisor. Mineer was reappointed to a four year term, retroactively beginning in January of 1988 and extending to January of 1992.[1]

[1] Two of the magistrates on the Fiscal Court who voted to approve the appointment, Ernie Reeves and Charles Jolly, had lost their primary elections and consequently had terms of office that expired in January of 1990. Therefore, the term of office they voted to approve for Mineer exceeded their own.

In September of 1989, Mineer announced he would run as a write-in candidate for County Judge/Executive and took a leave of absence from his road supervisor post to do so. Thereafter, the Fleming County Attorney requested an opinion from the Kentucky Attorney General's Office as to whether Mineer could run for elective office while on a leave of absence from his appointed post. The Attorney General's Office responded that a county road supervisor would have to resign from office in order to run for elective office.[2]

In November of 1989, Call was elected County/ Judge Executive. He took office in January of 1990, as did a newly-elected Fiscal Court. In an action taken January 8, 1990, the Fleming County Fiscal Court voted not to ratify the action of the former Fiscal Court which appointed Mineer to a four year term as County Road Supervisor, effectively terminating his employment.

V. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Defendants advance four arguments in support of the Motion for Summary Judgment. Initially

---

[2] The letter is signed by Nathan Goldman, Assistant Attorney General and is dated October 19, 1989. While Mr. Goldman writes that the letter "does not represent a formal legal opinion" he does state that on the basis of KRS 179.460, "it would appear to us that even though the county road engineer/foreman has taken a personal leave of absence, he is still prohibited from running for office. He would have to resign as county road engineer/foreman before he could run for county office." (Exh. 2, Mem. in Supp. of Mot. for Summ. J.).

they contend that Mineer had no constitutional right to continued employment beyond the tenure of the Fiscal Court who ratified his appointment, which terminated in January of 1990. They argue that as a matter of Kentucky law, the tenure of county employees cannot extend beyond the tenure of the members of the Fiscal Court which approves their appointments, citing KRS 67.710(7) and *Christian v. Belcher*, 888 F.2d 410 (6th Cir. 1989).

Secondly, they argue that the dismissal of Mineer was not improper, even if done for political purposes, relying on *Elrod v. Burns*, 427 U.S. 347 (1978) and *Christian v. Belcher, supra*. Defendants further contend that Mineer's job performance was unsatisfactory and had been for a number of years.

Third, the Defendants contend they are entitled to qualified immunity for their actions in dismissing Mineer because they acted in good faith and without malicious intent to deprive Mineer of his constitutional rights. They argue that at the time the Fiscal Court acted Mineer had no expectation of continued employment because the former court did not have authority to appoint him for a term which outlasted its own.

Next, the Magistrates argue that they are without authority to actually nominate or appoint employees and therefore are incapable of misusing that power within the context of 42 U.S.C. § 1983, citing *Christian v. Belcher, supra*. They contend that under KRS 67.710(7), it is the County Judge/Executive who has the

power to appoint the County Road Supervisor and therefore they, as Magistrates without such authority, should be entitled to official immunity and granted summary judgment.

Finally, the Defendants argue that public policy and tradition support allowing public officials to make employment decisions on the basis of party affiliation. The Defendants argue that despite the Supreme Court's holding in *Rutan v. Republican Party of Illinois*, 58 USLW 4872 (June 19, 1990), they should have the authority to terminate employees because of political differences.

In his response, the Plaintiff proposes a contrary interpretation of statutory and case law. He argues that the Defendants incorrectly interpret KRS 67.710(7) and that under the First Amendment he had a right to free speech without fear of reprisal. Mineer further argues that *Elrod v. Burns, supra*, is inapplicable to this situation because the position of Road Supervisor is not a policymaking one.

Mineer argues that the Defendants are not entitled to qualified immunity because their actions were not undertaken in good faith. He contends that the law against terminating employees for political reasons was firmly established at the time the Defendants terminated his employment. Further, Mineer argues that the Magistrates do have power to appoint county employees.

In their Reply, Defendants raise several new issues. They contend that Plaintiff has no property inter-

est in his employment, and therefore only his First Amendment claim remains. Defendants argue that the state cause of action for breach of contract precludes the assertion of a Section 1983 claim. They also argue that Mineer's Due Process rights were not infringed because he knew he had a right to a hearing but failed to ask for one after his employment was terminated.

Additionally, the Magistrate Defendants reiterate their defense of qualified immunity, arguing that even where there has been a violation of a clearly established right, it must be determined whether a reasonable official could reasonably have believed the action taken was lawful. Defendants contend that under prevailing statutory and case law, they had a reasonable basis for believing that Mineer's four year appointment was improper. They maintain that they are entitled to qualified immunity in their individual capacities because political considerations are appropriate in employment decisions involving policymaking personnel.

VI. STANDARDS FOR SUMMARY JUDGMENT

Summary judgment is appropriate if the moving party establishes that there is no genuine issue of material fact for trial and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The Court must consider all pleadings, depositions, affidavits, and admissions on file and draw reasonable inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *see Smith v.*

Hudson, 600 F.2d 60 (6th Cir.), *cert. dismissed*, 444 U.S. 986 (1979).

Once the movant shows that there is an absence of evidence to support the nonmoving party's case, the opposing party has the burden of coming forward with evidence raising the triable issue of fact. *Celotex Corp.*, 477 U.S. at 323. To sustain this burden, the opposing party may not rest on the mere allegations of his pleadings. Instead, it must set forth specific facts showing that there is a genuine issue for trial. *Potter's Med. Center v. City Hosp. Ass'n.*, 800 F.2d 1129 (6th Cir. 1986).

Ultimately, the standard for determining whether summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Booker v. Brown & Williamson Tobacco Co.*, 879 F. 2d 1304, 1310 (6th Cir. 1989) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)).

Applying these standards, the Court determines that the Defendants are entitled to partial summary judgment.

VII. DISCUSSION

A. Claims against the Magistrates

1. First Amendment Claims

By reference to the factually similar case of *Christian v. Belcher*, 888 F.2d 410 (6th Cir. 1989), many of the issues raised in this action may be decided. In *Christian*,

the former-Harlan County (Kentucky) Flood Plain Administrator and Building Inspector ("FPA") brought suit against the Harlan County Fiscal Court and the County Judge/Executive alleging he had been terminated as FPA solely for political purposes and as punishment for his exercise of his First and Fourteenth Amendment rights. He also alleged the defendants had denied him Due Process in failing to grant his request for a post-termination hearing.

KRS 67.710 provides, in relevant part, as follows:

> The county judge/executive shall be the chief executive of the county and shall have all the powers and perform all the duties of an executive and administrative nature vested in, or imposed upon, the county or its fiscal court by law... and such additional powers as granted by the fiscal court... His responsibilities shall include, but are not limited to, the following:
>
> (7) Exercise with approval of the fiscal court the authority to appoint, supervise, suspend, and remove county personnel (unless otherwise provided by state law);

In interpreting this statute the *Christian* court held,

> [T]he plain language of the statute indicates that the Fiscal Court has not general authority to nominate or appoint county employees. The statute grants the judge executive the "authority to appoint, supervise, suspend, and remove county personnel," subject only to the "approval of the fiscal court." This language clearly contemplates that, in general, only the Judge Executive may nominate person for county employment, and that the Fiscal

> Court must either accept or reject those nominations.

Christian at 414.

In sum, the Sixth Circuit held that summary judgment in favor of the defendant fiscal court was proper because under Kentucky law, the Magistrates did not have the authority to reappoint the plaintiff to county employment.

In this action, the Plaintiff in oral argument pointed out the parenthetical phrase in KRS 67.710(7), which allows the judge/executive to exercise his authority with the approval of the fiscal court "unless otherwise provided by state law." Mineer contended that this phrase distinguished his case from *Christian*. Mineer alleges that KRS 179.020(7) sets the term of office for the road supervisor at a two or four year term, within the discretion of the fiscal court, and thus fits within the KRS 67.710(7) exception.

This statutory grant of discretion to the fiscal court in setting the term of office at either two or four years does not imply that the fiscal court has any greater authority in the employment of the road supervisor than in the employment of any other county employee. In fact, KRS 179.020(1) and (2) expressly state that the judge/executive shall employ the road supervisor "with the consent of the fiscal court." Therefore, the Court is not persuaded that this action is distinguishable from *Christian*.

Plaintiff further contended at oral argument that

his employment was *terminated* from employment, unlike the situation in *Christian* where the plaintiff's term of office expired and the fiscal court failed to rehire him. However, the *Christian* court expressly stated that "decisions not to 'reappoint' state employees are treated the same as job 'terminations' in this context," *Christian* at 415, and therefore, that argument has no merit.

It is well settled that Section 1983 was enacted to protect individuals against the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law," *Monroe v. Pape*, 365 U.S. 167, 184 (1961). As the foregoing statutory and case law indicates, the Fleming County Magistrates had no authority to appoint or reappoint county employees such as Mineer, therefore the Court finds that summary judgment in favor of the Magistrate Defendants on his First Amendment claim is appropriate. As this issue has been decided in their favor, it is unnecessary to address the Magistrate Defendants' argument that they are entitled to qualified immunity on the First Amendment claim.

2. *State Law Wrongful Discharge Claims*

Although neither party has addressed this issue in the pleadings, it is clear from the foregoing discussion that Kentucky law does not provide Magistrates with the power to independently hire or discharge a county employee. Therefore there is no authority with which to hold the Magistrates liable for wrongful discharge under the common law of Kentucky.

3. Due Process Claims

To prove a violation of procedural due process, the Plaintiff must demonstrate that he was deprived of a constitutionally protected liberty or property interest and that federal due process requirements were disregarded. *Lee v. Western Reserve Psychiatric Habilitation Center*, 747 F.2d 1062, 1067 (6th Cir. 1984). An employee may demonstrate a protected property interest in continued employment by showing an express or implied state law basis for that interest. *Bishop v. Wood*, 426 U.S. 341 (1976). In *Perry v. Sinderman*, 408 U.S. 593 (1972), the Supreme Court held that a nontenured state employee may prove such an interest by showing that the policies and practices of the employer justified his legitimate claim of entitlement to continued employment.

Herein, Mineer alleges that Defendants violated his constitutional rights by failing to provide notice and a hearing required by KRS 179.060 "in that no charges were brought against him and no notice or opportunity for hearing was afforded him." (Compl. at 4).

Defendants contend that Mineer had no expectation of continued employment because his term of office expired contemporaneously with that of the administration that hired him. They support this argument by relying on the following discussion in *Christian*:

> [T]he district court expressly held that under Kentucky law, the terms of all county employees expire automatically at the end of each executive administration,... Since we have found no Ken-

> tucky authority to the contrary, we defer to the experienced district judge's interpretation of the law of the state in which he sits.

Christian at 414-415.

Mineer responds that he had been rehired for a four year term which was to extend to January of 1992, and therefore he had an expectation of continued employment.

There is evidence in the record which supports the Defendants' position. For example, in the Fleming County Fiscal Court Personnel Policies, Hiring Guidelines section, the following statement is made: "Both the date of employment and service date are established on the first date the employee reports for work; however, the former remains constant and the latter may be adjusted from time to time." Further, in the Administrative Code for the Operation of Fleming County, Section 510.2, it states that the "county road supervisor shall be appointed by the judge/executive with the consent of fiscal court and shall serve *at the pleasure of the court.*" (emphasis added). There is no proof in the record that Mineer had possession or knowledge of these documents.

In *Christian*, the Sixth Circuit reversed the district court's grant of summary judgment on the plaintiff's due process claims, despite the language in the same case which implies that an employee's term of office expires contemporaneously with the fiscal court which appointed him.

The *Christian* court found that the general policy and practice in Harlan County was to maintain employees upon a change in administrations and that the plaintiff was the only employee from the previous administration who was not reappointed. Based upon this evidence, the court concluded that the plaintiff had "raised a genuine issue of material fact concerning whether he had a legitimate claim of entitlement to continued employment such that defendants' failure to grant him a hearing violated the due process clause of the fourteenth amendment." *Christian* at 417.

Pursuant to *Christian*, there is a material issue of fact raised as to whether Mineer had an expectation of continued employment. In Call's deposition, for example, he admits that Mineer was fired even though "[t]he rest of the boys I did hire all of them." (Call Dep. at 19-20) This statement can be reasonably interpreted to show that other employees were allowed to maintain their jobs despite the change in administration, and Mineer may therefore have had an expectation in continued employment.

Further, in the case at bar, the evidence proferred by the Plaintiff is that he did not receive a hearing despite the provision in the Kentucky statutes mandating notice and a hearing upon removal of the Road Supervisor from office.

The Magistrate Defendants claim they are entitled to qualified immunity. Whether qualified immunity applies is purely a legal issue to be determined by the court. *See Garvie v. Jackson*, 845 F.2d 647 (6th Cir.

1988). In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court established that qualified immunity protects the actions of government officials, unless the conduct violates "clearly established statutory or constitutional rights." The standard was further defined in the case of *Anderson v. Creighton*, 483 U.S. 635, 639 (1987), wherein the Court stated that the issue of whether qualified immunity will protect an official from personal liability for an allegedly unlawful action "generally turns on the 'objective legal reasonableness' of the action, assessed in the light of the legal rules that were 'clearly established' at the time it was taken." (citations omitted). In determining whether the rules were "clearly established" at the time of the alleged violation, we look to "federal constitutional, statutory or case law existing at the time." *Poe v. Haydon*, 853 F.2d 418, 424 (6th Cir. 1988).

Herein, KRS 179.060 expressly states that the "county judge/executive may remove the county (road supervisor)... at any time for incompetency, malfeasance or misfeasance in office upon written charges after a hearing of which ten (10) days' notice shall be given..."

There is no evidence presented in the record as to the procedures normally implemented in Fleming County to serve notice upon and arrange hearings at the request of terminated employees. However, the Fleming County documents referred to above do establish that the road supervisor is to serve "at the pleasure of the (fiscal) court."

The Court finds that a jury question exists as to whether the Defendant Magistrates should reasonably have known of Mineer's right to notice and a hearing. In the case of *Poe v. Haydon, supra*, the Sixth Circuit stated:

> [S]ummary judgment would be not appropriate if there is a factual dispute (i.e., a genuine issue of material fact) involving an issue on which the question of immunity turns, such that it cannot be determined before trial whether the defendant did acts that violate clearly established rights. Summary judgment also should be denied if the undisputed facts show that the defendant's conduct did indeed violate clearly established rights. In either event, the case will proceed to trial, unless the defendant takes a successful interlocutory appeal on the issue of qualified immunity.

Poe at 426.

Therefore, a grant of summary judgment to the Defendants on this claim would be inappropriate.

B. Claims against the County Judge/Executive

In support of the Motion for Summary Judgment, the County Judge/Executive argues that it was not improper to terminate Mineer's employment for purely political reasons. Call relies on a line of Supreme Court cases which recognize that an employer may consider an individual's political affiliations in making certain employment decisions.

However, in *Elrod v. Burns*, 427 U.S. 347, 375 (1976), the Court held that a government employer may make

politically motivated personnel decisions only when "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the office involved." In formulating this opinion, the Court drew a distinction between "policymaking" and "nonpolicymaking" employees and held that only in the case of policymaking employees could party affiliation be an appropriate requirement for the effective performance of the office.

Subsequently, the Court held that unless political loyalty is "essential to the discharge of the employee's governmental responsibilities," then dismissal of the employee for political reasons is unconstitutional. *Branti v. Finkel*, 445 U.S. 507, 518 (1980). The Sixth Circuit interpreted these holdings, stating that "once the employee shows that he was terminated... solely because of his political expression or association, *Branti* imposes a heavy burden upon the employer to justify that action." *Christian* at 415.

Recently, in *Rutan v. Republican Party of Illinois, supra*, the Court broadened the scope of this rule to include hirings and promotions based on political considerations as well as discharges. The *Rutan* Court stated that "conditional hiring decisions based on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so." *Rutan*, 58 USLW at 4876.

In *Christian*, the Sixth Circuit imposed a burden on the county judge/executive to "demonstrat[e] that political loyalty is essential to the discharge of the [employee's]

duties." *Christian* at 416. The court denied summary judgment, finding that material facts remained as to whether the employee's termination was based solely on political considerations and whether the political loyalty was an appropriate job requirement.

However, in the case *sub judice* the Defendant Call claims qualified immunity as a defense. The discussion above in section VII.A.3 sets forth the standards to be applied in determining whether qualified immunity is applicable. Without repeating those standards, the discussion below will refer to them.

The Sixth Circuit recently addressed the issue of qualified immunity in the context of a wrongful termination suit in *Gossman v. Allen*, 950 F.2d 338 (6th Cir. 1991) Plaintiff Gossman, a former employee of the Louisville (Kentucky) and Jefferson County Board of Health, brought a state law and First Amendment action against her former employer alleging she had been wrongfully terminated because of statements she made to the media, the public and a court. The defendants claimed they were entitled to qualified immunity on all claims.

The Sixth Circuit affirmed the district court's denial of qualified immunity on the state law claims "[s]ince (the plaintiff's) state law claims for damages do not invoke any federal law whatsoever, qualified immunity is not an available defense." *Gossman* at 341.

As to the federal law claims, the court held that

[t]he proper inquiry is not whether the claimed

> right existed in the abstract, but whether a reasonable official would have known that the challenged conduct violated that right. Under this test, an official will be immune 'if officers of reasonable competence could disagree' on whether the conduct violated the plaintiff's rights.

Gossman at 341.

In the case at bar, Mineer alleges state law causes of action based on KRS 179.020 and 179.060 as well as a common law wrongful discharge claim. These statutes provide for the hiring, term of office and removal from office of the county road supervisor. KRS 179.060 specifically addresses the procedures to be undertaken for removal of the engineer, including serving "written charges after a hearing." These causes of action do not invoke any federal law but are claims for damages based on state law. Therefore, pursuant to *Gossman*, qualified immunity is not available to Defendant Call as a defense to Mineer's state law claims.

As to Mineer's federal law claims, Call's claim of qualified immunity requires the Court to ask whether a reasonable official would have known that terminating Mineer's employment violated his First, Fifth and Fourteenth Amendment rights. However, as is discussed above, the *Christian* court determined that the issues of whether an employee's termination was based solely on political affiliations and whether political considerations were an appropriate job requirement are matters which are jury questions and cannot be decided on a motion for summary judgment.

This conundrum is considered and solved in *Poe v. Haydon*, *supra*. Therein, the Sixth Circuit stated:

> [S]ummary judgment would be not appropriate if there is a factual dispute (i.e., a genuine issue of material fact) involving an issue on which the question of immunity turns such that it cannot be determined before trial whether the defendant did acts that violate clearly established rights. Summary judgment also should be denied if the undisputed facts show that the defendant's conduct did indeed violate clearly established rights. In either event, the case will proceed to trial, unless the defendant takes a successful interlocutory appeal on the issue of qualified immunity.

Poe at 426.

Here, the right at issue is the right not to be fired from a job for purely political purposes when political considerations are not an appropriate factor for the performance of that job. The Court concludes that a jury issue exists as to whether Mineer had a right not to be terminated from his position as Fleming County Road Supervisor, and whether political affiliation is an appropriate consideration for the position of road supervisor.

Further, there is a material issue of fact which exists as to whether Mineer was terminated for purely political reasons. There is evidence in the record that the Fiscal Court members had declined to approve his appointed on several occasions as well as testimony in deposition that Mineer had not performed his duties as

Road Supervisor in a satisfactory manner.[3] On the contrary, there is evidence in the record from which the reasonable inference could be drawn in favor of Mineer that he was terminated solely because he contested Call's candidacy for Judge/Executive. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). For example, in his deposition, Mineer states that Call told him, "if I can get it done I'm going to let you go. And he said I don't want any hard feelings, but he said, you know, I promised your job to another guy." (Mineer Dep. at 43.)

Therefore, pursuant to the holding in *Poe*, the Defendant Call's motion for summary judgment must be denied and the Court finds that he is not entitled to qualified immunity.

VIII. CONCLUSION

For the foregoing reasons, the Court concludes that partial summary judgment in the case is appropriate. An Order consistent with this Memorandum Opinion will be issued on the same date herewith.

This 4th day of March, 1992.

/s/ Karl S. Forester, Judge

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[3] Deposition of L.C. Cord, Jr., at 21.

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No. 93-628

In The

Supreme Court of the United States

October Term, 1993

WILLIAM MINEER,

Petitioner,

versus

FLEMING COUNTY, KENTUCKY; FLEMING COUNTY FISCAL COURT; JEWELL CALL, Fleming County Judge/Executive, in his official and individual capacity; and the FLEMING COUNTY FISCAL COURT MEMBERS, Gary C. Harmon, Andy Cole, John Sims, Ronnie Carpenter, William Thompson, and L.C. Cord, in their official and individual capacities,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether, in view of public policy and deeply rooted historical tradition, this Court should reconsider and overrule *Rutan v. Republican Party of Illinois?*

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

JURISDICTION 2

STATEMENT OF THE CASE 4

REASONS FOR DENYING THE WRIT 14

I. The Opinion of the United States Court of Appeals Granting Qualified Immunity to Judge/Executive Call Relied Upon Established Precedent of this Court 14

II. The Opinion of the Sixth Circuit Court of Appeals Correctly Granted the Members of the Fiscal Court Qualified Immunity as to Petitioner's Fourteenth Amendment Due Process and First Amendment Claims, Since the Magistrates Had No Authority to Act Under Kentucky Law and Further, Because Petitioner Had No Property Interest Under State Law Protecting His Right to Continued Employment 17

III. Public Policy and Tradition Support Party Affiliation as a Valid Basis for Employment Decisions by Public Officials 19

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Creighton, 483 U.S. 635, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987) 14

Bowers v. Hardwick, 478 U.S. 186, 92 L.Ed.2d 140, 106 S.Ct. 2841 (1986) 22

Branti v. Finkel, 445 U.S. 507, 63 L.Ed.2d 574, 100 S.Ct. 1287 (1980) 13, 15

Broadrick v. Oklahoma, 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973) 20, 21

Brown v. Glines, 444 U.S. 348, 62 L.Ed.2d 540, 100 S.Ct. 594 (1980) 22

Burnham v. Superior Court of California, County of Marin, 495 U.S. 604, 109 L.Ed.2d 631, 110 S.Ct. 2105 (1990) 22

CSC v. Letter Carriers, 413 U.S. 548, 37 L.Ed.2d 796, 93 S.Ct. 2880 (1973) 20

Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886, 6 L.Ed.2d 1230, 81 S.Ct. 1743 (1961) 21

Cagle v. Gilley, 957 F.2d 1347 (6th Cir. 1992) 13, 15

Camara v. Municipal Court of San Francisco, 387 U.S. 523, 18 L.Ed.2d 930, 87 S.Ct. 1727 (1967) 22

Christian v. Belcher, 888 F.2d 410 (6th Cir. 1989) 4, 18

Connick v. Myers, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983) 21, 22

Elrod v. Burns, 427 U.S. 347, 49 L.Ed.2d 547, 96 S.Ct. 2673 (1976) 20, 23

TABLE OF AUTHORITIES – Continued

Page

Firestone Textile Company Division v. Meadows, Ky., 666 S.W.2d 730 (1984) 5

Guercio v. Brody, 911 F.2d 1179 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1681 (1991) 11

Harlow v. Fitzgerald, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982) 14

Kelley v. Johnson, 425 U.S. 238, 47 L.Ed.2d 708, 96 S.Ct. 1440 (1976) 20, 21

Minniefield v. State of Alabama, 542 F.2d 947 (5th Cir. 1976) 4

Monks v. Marlinga, 923 F.2d 423 (6th Cir. 1991) 13

O'Connor v. Ortega, 480 U.S. 709, 94 L.Ed.2d 714, 107 S.Ct. 1492 (1987) 20

Public Workers v. Mitchell, 330 U.S. 75, 91 L.Ed.2d 754, 67 S.Ct. 556 (1947) 20, 22

Rutan v. Republican Party of Illinois, 497 U.S. 62, 111 L.Ed.2d 52, 110 S.Ct. 2729 (1990) 15, 19

Upton v. Thompson, 930 F.2d 1209 (7th Cir. 1991) 16

Williams v. City of River Rouge, 909 F.2d 151 (6th Cir. 1990) 13

Wirth Ltd. v. S/S. Acadia Forest, 537 F.2d 1272 (5th Cir. 1976) 4

STATUTES:

KRS 67.710(7) 5, 18

KRS 179.020 18

TABLE OF AUTHORITIES – Continued

Page

KRS 179.020(2) 5

KRS 179.020(7) 5

OAG 78-432 ..... 5, 18

28 U.S.C. § 46(d) 3

No. 93-628

In The

Supreme Court of the United States

October Term, 1993

WILLIAM MINEER,

Petitioner,

versus

FLEMING COUNTY, KENTUCKY; FLEMING COUNTY FISCAL COURT; JEWELL CALL, Fleming County Judge/Executive, in his official and individual capacity; and the FLEMING COUNTY FISCAL COURT MEMBERS, Gary C. Harmon, Andy Cole, John Sims, Ronnie Carpenter, William Thompson, and L.C. Cord, in their official and individual capacities,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Opinion of the United States Court of Appeals for the Sixth Circuit entered on May 4, 1993.

JURISDICTION

This Court does *not* have jurisdiction to consider the Petition for Writ of Certiorari herein. The Opinion of the United States Court of Appeals for the Sixth Circuit was entered on May 4, 1993. (*See* Petitioner's Appendix A to Petition for Writ of Certiorari, hereafter "Petitioner's Appendix," p. 1a). Neither Petitioner nor Respondents filed a Petition for Rehearing in the Sixth Circuit Court of Appeals. The 90 days within which Petitioner had to file his Petition for Writ of Certiorari expired on August 2, 1993. Even if a Justice of this Court, for good cause shown, had extended the time to file a Petition for Writ of Certiorari for a period not exceeding 60 days, Petitioner would have had to file his Petition no later than October 1, 1993.

Petitioner attempts to disguise his Petition with the cloak of timeliness by suggesting that the "Final Opinion and Order" of the sixth circuit was entered on September 3, 1993. [Petition for Writ of Certiorari, "Jurisdiction," p. 2]. What Petitioner erroneously refers to as the Final Opinion of the court of appeals was actually an Order, and was not even entered in the case from which Petitioner now seeks a Writ of Certiorari.

After the Opinion of the Sixth Circuit Court of Appeals was entered on May 4, 1993, the district court did not enforce the mandate of the sixth circuit as to County Judge/Executive Jewell Call, hereafter "Call". Consequently, only Call filed a Petition seeking a Writ of Mandamus directing the district court to enforce the sixth circuit's mandate. [*In re: Jewell Call, individually and in his official capacity as Fleming County Judge/Executive,* Sixth

Circuit Docket No. 93-6046, Respondents' Appendix A, p. 1]. Call correctly ascertained the Opinion of the sixth circuit which had reversed the denial of qualified immunity to him on both Petitioner's First Amendment and Fourteenth Amendment due process claims.[1] The district court did not respond to Call's Petition for Writ of Mandamus. Thereafter, on September 3, 1993, the sixth circuit entered an Order directing the district court to take all appropriate steps to enforce its mandate, *per its Opinion of May 4, 1993*, and ordered the Petition for Writ of Mandamus dismissed. (*See* Petitioner's Appendix B, pp. 29a-31a).

There is no authority, either in the United States Code, the Rules of this Court, or in the case law which would allow an automatic extension of time in which to file a Petition for Writ of Certiorari from a final opinion of a federal court of appeals *simply because the Petitioner misunderstood the import of the decision of the court of appeals*. Even Petitioner must readily concede that only one member of the sixth circuit panel, Judge Churchill, was of the opinion that Call was not entitled to qualified immunity. Judge Churchill's opinion could not be understood to have been the Opinion of the Court. 28 U.S.C. § 46(d) provides that "[a] majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum."

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[1] In its May 4, 1993 Opinion, the sixth circuit noted that Petitioner had abandoned his Fifth Amendment claims noting that Petitioner "does not explain how the Fifth Amendment was implicated." (*See* Petitioner's Appendix A, p. 4a, n.1). Likewise, Petitioner has failed to raise any Fifth Amendment claims in his Petition for Writ of Certiorari.

In other words, two of three judges constitute a quorum. *Minniefield v. State of Alabama*, 542 F.2d 947 (5th Cir. 1976); *Wirth Ltd. v. S/S Acadia Forest*, 537 F.2d 1272 (5th Cir. 1976). With respect to Call, two members, or a quorum, of the panel voted in *favor* of qualified immunity. There simply can be no reasonable disagreement that two votes of a three-member panel are sufficient to prevail.

In any event, assuming this Court were to relax the statutes and rules governing its jurisdiction, Petitioner cannot offer his own "confusion" about the Opinion of the sixth circuit to suggest that his Petition, as it relates to the Respondent Magistrates, is timely. *All three* of the panel members of the sixth circuit concurred in their Opinion of May 4, 1993 that the Magistrates were entitled to qualified immunity on both Petitioner's First Amendment and due process claims. By failure to file a timely Petition, certainly Petitioner has waived further review of the grant of qualified immunity to the Respondent Magistrates.

STATEMENT OF THE CASE

The Petitioner's Statement of the Case omits key facts which support the legal grounds upon which the Sixth Circuit Court of Appeals based its Opinion.

Respondents herin collectively constitute the governing body of Fleming County, Kentucky. Respondent Jewell Call is the Chief Executive Officer, known as the County Judge/Executive. Respondents, Harmon, Cole, Sims, Carpenter, Thompson and Cord are the elected

members, known as Magistrates, who comprise the Fiscal Court of Fleming County.

Under Kentucky law, a County Judge/Executive must nominate prospective employees to the Fiscal Court. Thereafter, with the consent of a majority of the Fiscal Court, the person nominated is employed.

Petitioner had been employed as the Fleming County Road Supervisor. The Road Supervisor's employment is governed by Kentucky Revised Statute (KRS) 179.020(2), which provides that the County Road Supervisor "shall be employed by the County Judge/Executive with the consent of the Fiscal Court and who may be removed in the same manner provided for county road engineers." Importantly, Kentucky law also provides that the tenure of county employees cannot extend beyond the tenure of the members of the Fiscal Court which appoints them.[2] Once his lawful term had expired, Petitioner became an employee at will who could be terminated for good cause, for no cause, or for a cause that some might view as morally indefensible.[3]

Petitioner's employment history as the Fleming County Road Supervisor is significant, as it relates to both Petitioner's First Amendment and Fourteenth Amendment due process claims. Petitioner was nominated by former Fleming County Judge/Executive, Bill Owens, in 1978, and approved by the Fiscal Court. As KRS 179.020(7) allowed employment of a County Road Supervisor for a term of either two or four years in the

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[2] KRS 67.710(7); Opinion of the Attorney General 78-432; *Christian v. Belcher*, 888 F.2d 410 (6th Cir. 1989).

[3] *Firestone Textile Company Division v. Meadows*, Ky., 666 S.W.2d 730, 731 (1984).

discretion of the Fiscal Court, Petitioner was initially appointed to a four-year term, expiring at the end of December, 1981 (coincident with the expiration of the term of the appointing Fiscal Court). In January, 1982, Judge Owens renominated Petitioner as Road Supervisor. The Fiscal Court again approved the nomination for another four years (again, coincident with the term of office of the appointing Fiscal Court).

In January, 1986, Judge Owens once more nominated Petitioner to the Fiscal Court for approval as Road Supervisor. This time, however, the Magistrates voted 5-1 against his reappointment. Petitioner continued to hold the position, albeit unlawfully, as Road Supervisor. In February, 1986, Judge Owens again nominated Petitioner, and the Fiscal Court again voted against him 5-1. Nonetheless, Petitioner continued to work as Fleming County Road Supervisor until September, 1986, when the Fiscal Court voted 3-3 on Petitioner's nomination by Owens. Since Judge Owens was qualified to vote in the event of a tie, Owens broke the tie with his own vote for Petitioner. Petitioner was then appointed to a two-year term (rather than the four-year terms to which he had previously been appointed), which retroactively began in January, 1986, and expired in January, 1988. In January, 1988, Judge Owens failed to submit Petitioner's name to the Fiscal Court for approval, as required by Kentucky law. Even though he had no lawful appointment, Petitioner continued to work as Fleming County Road Supervisor. In May, 1989, Judge Owens lost the primary election for County Judge/Executive to Respondent Call. Several months thereafter, while still in office, Owens once again nominated Petitioner to the Fiscal Court for the position of

County Road Supervisor. Two of the six Magistrates had also lost their primary elections, and along with Judge Owens, would be completing their term of office in December, 1989. Nonetheless, the Magistrates not only approved the nomination, but voted for a four-year term, knowing that the appointment would exceed their own terms of office, an apparent violation of Kentucky law. In fact, the Fleming County Attorney, Frank McCartney, advised the Fiscal Court at that time that, even though they had voted on a four-year term for Petitioner, Petitioner's employment would expire after *two* years, in January, 1990, because one Fiscal Court could not bind the next. In September, 1989, one month after he had been nominated by a lame duck Judge/Executive and approved by at least two lame duck Magistrates, Petitioner decided to run as a write-in candidate against Judge Call for the position of Judge/Executive. Petitioner requested a leave of absence from October 4, 1989 through November 7, 1989 to conduct his campaign. McCartney advised Petitioner that he had written the Attorney General of the Commonwealth of Kentucky, requesting an opinion as to whether a Road Supervisor could run for Judge/Executive while on personal leave of absence from county employment. In October, 1989, the Attorney General's office advised McCartney that the Road Supervisor would have to resign before he could run for county office.

In January, 1990, the newly elected Fiscal court voted not to ratify the action of the former Fiscal Court, which

had supposedly appointed Petitioner to a four-year term, which exceeded the term of the appointing authority.

The evidence adduced of record well supported the consideration of political affiliation in hiring the Road Supervisor. Fleming County, Kentucky is a rural, agricultural community. The Road Supervisor reports directly to the County Judge/Executive, makes recommendations to the Fiscal Court about the most economic utilization of county road funds, is responsible for the daily supervision of the Road Department, is authorized to sign purchase orders that would obligate the county, has the authority to authorize overtime for Road Department employees, makes decisions with respect to the priority of work to be done in the county, and makes recommendations to the County Judge/Executive regarding wages and salaries for Road Department employees. Respondent Cord testified that the construction and repair of county roads was the top priority of county government. Respondent Thompson testified that road construction, repair and maintenance is the main function of Fleming County government. Respondent Call was of like opinion.

Further, without regard to politics, there were many instances of dissatisfaction with the manner in which Petitioner was performing his job as Road Supervisor (apparently, dating back to January 1986, when Judge Owens' third nomination of Petitioner was soundly defeated, some three years before Call ran for office in the primary election). There were complaints that Petitioner could not control the men he supervised, that Petitioner would not go on jobs with his employees, that Petitioner's whereabouts were unknown on days he should

have been working, and that Petitioner did not respond to requests of Fiscal Court members. For most of the time Petitioner was Road Supervisor, jobs would not be completed, or when completed, were done improperly and inefficiently.

Due to the number of complaints about Petitioner, and because of the extensive contact that the Road Supervisor has with the public in Fleming County, Call decided to nominate his own appointee after Fiscal Court voted not to ratify Petitioner's four-year term. Call wanted to appoint someone who could effectively carry out his policies as County Judge/Executive.

Petitioner admitted he knew that a county employee had a right to a hearing when terminated. Nonetheless, Petitioner admitted he never sought a hearing, review or appeal of the Fiscal Court's decision not to ratify his term of employment.

Procedural History

Petitioner commenced his lawsuit in the United States District Court for the Eastern District of Kentucky claiming damages for alleged constitutional violations. His complaint also included pendent state law claims. The district court granted the Magistrates' Motion for Summary Judgment as to Petitioner's First Amendment claims and state law wrongful discharge claims, holding that the Respondent Magistrates had no authority to appoint or re-appoint county employees such as Petitioner, absent nomination by the County Judge/Executive. The district court denied the Magistrates' Motion for Summary Judgment on Petitioner's due process claims,

believing that there was a material issue of fact whether Petitioner had an expectation of continued employment.

With respect to Respondent Call, the district court denied his Motions for Summary Judgment as to both the First Amendment and Fourteenth Amendment due process claims. On appeal, a panel of the Sixth Circuit Court of Appeals unanimously reversed the decision of the district court, and granted qualified immunity to the Magistrates on Petitioner's due process claims:

> Applying the law to the undisputed facts of this case, the members of the fiscal court did not have the legal capacity to deprive Mineer of constitutional rights in connection with his termination.
>
> The sole power of removal was vested in the county's chief executive office. As a matter of law, it is doubtful that the fiscal court would have played a role had Judge Call followed the statute in removing Mineer. Call did not initiate removal proceedings. The fiscal court had no authority to conduct a hearing.

Petitioner's Appendix A, pp. 13a-14a.

Further, *two* members of the panel agreed that the district court erred in denying qualified immunity to Respondent Call on both Petitioner's First Amendment and Fourteenth Amendment due process claims.

The sixth circuit correctly held that the resolution of Mineer's due process claim turned on the proper construction of his property interest under Kentucky law.

The Court then determined that Petitioner had no property interest in his job as Road Supervisor as of January 1, 1990, and therefore, had no due process protection[4]:

> The conclusion of this court in *Christian [v. Belcher*, 888 F.2d 410 (6th Cir. 1988)] that the terms of non-civil service employees expire contemporaneously with that of the outgoing administration remains the most commonsensicle reading of the applicable Kentucky law. *See* OAG 82-63 (absent a merit system, county employees – including the county road supervisor – under a previous administration automatically lose their jobs at the beginning of the new administration); OAG 82-22 (present fiscal court may not bind fiscal court coming into office in January 1982, with a contract for county road supervisor; appointee could only fill out the remainder of the term ending on the second Tuesday of January 1982). Kentucky Revised Statutes Annotated § 179.020(7) has much less relevance than Mineer attempts to give it. The statute gives the county executive the power to employ a county road engineer or supervisor with the consent of the fiscal court. *See* OAG 82-142. Both the county executive and the fiscal court magistrates serve four-year terms. Ky. Rev. Stat. Ann. § 67.050 (magistrates); Ky. Rev. Stat. Ann. § 67.700 (county executive). Thus, the statute serves only to give the county executive and

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[4] In fact, the sixth circuit Opinion recognized that even if Kentucky law were unclear regarding the terms of County Road Supervisors, such that reasonable county officials could disagree on the issue, immunity should attach. Petitioner's Appendix A, p. 20a, n. 1 (citing *Guercio v. Brody*, 911 F.2d 1179 (6th Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S. Ct. 1681 (1991)).

> the magistrates the flexibility to make either one or two supervisor appointments *during their terms.*
>
> * * *
>
> A coherent reading of the entire statute compels the conclusion that a road supervisor cannot serve a two-year term and then receive a four-year appointment, as was attempted by the incumbents in this case.
>
> * * *
>
> To read the statute otherwise would allow the absurdity that has developed in this case – lame duck magistrates and county executives could appoint officers to terms of office which would bind succeeding popularly-elected administrations. Such a thwarting of the majority will is not commanded by Kentucky law. *Mineer did not have a valid contract which extended his term in office beyond January, 1990.*

Petitioner's Appendix A, pp. 21a-23a (emphasis added).

With respect to Petitioner's First Amendment claim against Respondent Call, the court of appeals held that, "[i]n January 1990, First Amendment law did not clearly establish that a county executive could not refuse to rehire county road supervisors for politically motivated reasons." (Petitioner's Appendix A, p. 25a). In reviewing this Court's reformulation of the inquiry in political affiliation/employment cases, the court of appeals noted that this Court had "abandon[ed] the labels 'policymaker' or 'confidential employee' in favor of asking 'whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.' " Petitioner's Appendix A,

p. 26a (citing *Branti v. Finkel*, 445 U.S. 507, 518, 63 L.Ed.2d 574, 100 S.Ct. 1287 (1980)). More specifically, the court of appeals summarized the state of the law on the issue of politically motivated personnel decisions, characterizing the law as "unsettled." Petitioner's Appendix A, p. 27a (citing *Cagle v. Gilley*, 957 F.2d 1347 (6th Cir. 1992)). In fact, the court of appeals cited its own recent cases holding that "a wide variety of public officials do not enjoy the right to be free from patronage dismissal." Petitioner's Appendix A, p. 28a (citing *Monks v. Marlinga*, 923 F.2d 423 (6th Cir. 1991) (city prosecutor), and *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990) (city attorney)). In sum, the court of appeals held that "[w]hatever the ultimate merits of Mineer's claim, it cannot be said that he had a clearly established right as a county road supervisor to be free from a politically motivated dismissal." [*Id.*]

On remand, the district court refused to enforce the mandate of the sixth circuit, dismissing all of Petitioner's claims against the Magistrates, but retaining jurisdiction over Petitioner's claims against Call. Respondent Call then petitioned for a writ of mandamus seeking enforcement of the Opinion and mandate of the sixth circuit directing the claims against him be dismissed. As noted, *supra*, the sixth circuit did in fact direct the district court to take all appropriate steps to enforce its mandate. *In re: Jewell Call*, Docket No. 93-6046, Petitioner's Appendix B, pp. 29a-31a.[5]

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[5] On November 2, 1993, the district court entered an Order conforming with the mandate of the court of appeals.

REASONS FOR DENYING THE WRIT

I. The Opinion of the United States Court of Appeals Granting Qualified Immunity to Judge/Executive Cal! Relied Upon Established Precedent of This Court.

The rule of law regarding qualified immunity has been affirmatively established by the precedent of this Court. In *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982), this Court held that a public official is entitled to qualified immunity if he acted reasonably in light of established law, i.e., that he had a state of mind free of malicious intention to deprive another of his federally secured rights. *Harlow*, 457 U.S. at 815. In *Anderson v. Creighton*, 483 U.S. 635, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987), this Court further elaborated on the qualified immunity standards set forth in *Harlow:*

> [T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: the contours of the right must be sufficiently clear so that a reasonable official would understand that what he is doing violates that right. . . . [I]n the light of pre-existing law, the unlawfulness must be apparent.

Anderson, 483 U.S. at 640.

The sixth circuit correctly identified the appropriate inquiry in cases alleging politically motivated personnel decisions. The court of appeals relied upon this Court's abandonment of the labels "policymaker" or "confidential employee" in favor of asking "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of

the public office involved." Petitioner's Appendix A, p. 26a (citing *Branti v. Finkel*, 445 U.S. 507, 518 (1980)).

In making the particularized inquiry demanded by this Court, the court of appeals noted that the state of the law on the issue of politically motivated personnel decisions was "unsettled." Petitioner's Appendix A, p. 27a (citing *Cagle v. Gilley*, 957 F.2d 1347, 1349 (6th Cir. 1992)). In *Cagle*, the sixth circuit reversed a district court's denial of summary judgment to a sheriff who had failed to rehire former deputies, allegedly due to their election support of an opponent. The sixth circuit concluded that "any sheriff of reasonable competence in [defendant's] position, measured objectively, would [not] have clearly understood that he was under an affirmative duty to have refrained from refusing to reappoint the deputies in August and September, 1988." *Cagle*, 957 F.2d at 1349. It must be recalled that the personnel decision complained of herein by Petitioner occurred in early January, 1990, some six-and-a-half months before the decision of this Court in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 111 L.Ed.2d 52, 110 S.Ct. 2729 (1990). The sixth circuit correctly found that it could not be said that Petitioner had a clearly established right in January, 1990, as a county road supervisor to be free from a politically motivated dismissal.[6] Interestingly, Petitioner himself

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[6] The sixth circuit assumed for purposes of qualified immunity that the county road supervisor was in fact subject to a politically motivated dismissal, finding that if it had been clearly established that political considerations were not an appropriate job requirement, then the question whether defendant's dismissal was motivated solely by politics would give rise to a jury question.

recognizes that the law was *not* clearly established despite his protestations to the contrary. Petitioner writes, in support of his argument for the writ:

> The reason this Court should grant this Petition for Certiorari is that, as Justice Powell wrote in his dissent in *Branti, supra,* 'The standard [for politically based firings] articulated by the court is framed in vague and sweeping language. Elected and appointed officials at all levels no longer will know when political affiliation is an appropriate consideration in filling a position.'

Petition for Writ of Certiorari, p. 14 (citation omitted).

Further, Petitioner cites the Opinion of the United States Court of Appeals for the Seventh Circuit in *Upton v. Thompson,* 930 F.2d 1209 (7th Cir. 1991) in a doomed attempt to find support for his Petition:

> So after *Branti,* the test is whether party affiliation is [an] appropriate requirement for effective job performance. Jobs requiring party affiliation for effective job performance may or may not be of the policymaking or confidential variety. That is, between the strictly menial government worker (who under *Elrod* and *Branti,* is clearly and completely protected from patronage firing) and the policymaker/confidential assistant (whose protection from patronage firing is non-existent) *there is a range of government positions for which the propriety of patronage firing has depended largely on the court's juggling of competing constitutional and political values. The results have not been consistent.*

Petition for Writ of Certiorari, p. 15 (emphasis added).

Petitioner's reliance on these authorities only *supports* the denial of the writ, since Petitioner failed to show it was clearly established that he had a "particularized right" to be free from politically motivated firing as the Fleming County Road Supervisor.

Simply put, the issues faced by the United States Court of Appeals for the Sixth Circuit involve questions of law peculiar to the Commonwealth of Kentucky and, more particularly, peculiar to the status, job requirements, and political association appropriate to the job of road foreman. Accordingly, this case does not present questions of conflict among the various circuit courts of appeal, nor is the opinion of the sixth circuit inconsistent with this Court's previous decisions in cases involving either considerations of political affiliation in employment cases, or decisions in cases involving qualified immunity generally.

II. The Opinion of the Sixth Circuit Court of Appeals Correctly Granted the Members of the Fiscal Court Qualified Immunity as to Petitioner's Fourteenth Amendment Due Process and First Amendment Rights, Since the Magistrates Had No Authority to Act Under Kentucky Law and Further, Because Petitioner Had No Property Interest Under State Law Protecting His Right to Continued Employment.

As noted, *supra*, the Respondents believe that this Court does not have jurisdiction to consider the question raised by Petitioner, as Petitioner failed to file a timely Petition for Writ of Certiorari.

In any event, the Sixth Circuit Court of Appeals correctly analyzed both state and federal law in reversing the denial of summary judgment to the Magistrates. Both of Petitioner's claims revolve around questions of state law, which are inappropriate for further review by this Court.

A. Fourteenth Amendment.

The sixth circuit correctly found that Petitioner did not state a Fourteenth Amendment procedural due process claim against the Magistrates because Petitioner had no property right under state law protected by the Fourteenth Amendment. The sixth circuit correctly relied upon KRS 179.020; KRS 67.710(7); Opinion of the Attorney General, OAG 78-432; and its own precedent, *Christian v. Belcher*, 888 F.2d 410, 414 (6th Cir. 1989). Taken together, the foregoing authorities establish that, under Kentucky law, the terms of all county employees expire automatically at the end of each executive administration. The court of appeals thus found that, while a fiscal court could appoint a road supervisor to either a two-year or a four-year term, the fiscal court could *not* appoint a road supervisor to a term of office which would bind succeeding popularly elected administrations. Therefore, Petitioner had no legitimate claim of entitlement to continued employment, and thus no interest protected by the Due Process Clause of the Fourteenth Amendment.

B. First Amendment.

Respondents acknowledge that even an employee with no interest in continued employment protected by

the Fourteenth Amendment Due Process Clause might yet have an interest in being free from political retaliation under the First Amendment. However, in order to prove a First Amendment violation, Petitioner would have to prove the Magistrates had the authority to act with respect to his failure to be re-hired. The sixth circuit correctly found that "[a]pplying the law to the undisputed facts of this case, the members of the fiscal court did not have the legal capacity to deprive Mineer of constitutional rights in connection with his termination." (Petitioner's Appendix A, p. 13a).

The decision of the sixth circuit does not create a conflict among the various circuits, nor does the opinion conflict with any established precedent from this Court. Accordingly, Petitioner has failed to show sufficient reason for granting the writ.

III. Public Policy and Tradition Support Party Affiliation as a Valid Basis For Employment Decisions By Public Officials.

In *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 111 L.Ed.2d 52, 110 S.Ct. 2729 (1990), this Court determined that the patronage system is unconstitutional, except when utilized for those jobs for the performance of which, party affiliation is an "appropriate requirement." *Rutan*, 497 U.S. at 64, 111 L.Ed.2d at 60, 110 S.Ct. at 2729. This ruling went against long-standing tradition that was firmly rooted in many areas of public employment.

The Constitution places different restrictions upon the government in its capacity as a lawmaker, than as an

employer. This Court has recognized this in many contexts, with respect to many different constitutional guarantees. For example, in *Kelley v. Johnson*, 425 U.S. 238, 247, 47 L.Ed.2d 708, 96 S.Ct. 1440 (1976), this Court found that, while private citizens cannot be prevented from wearing long hair, policemen could be prohibited. Likewise, in *O'Connor v. Ortega*, 480 U.S. 709, 723, 94 L.Ed.2d 714, 107 S.Ct. 1492 (1987), this Court found that, although private citizens may not have their property searched without probable cause, in many circumstances government employees could be subject to searches. Significantly, private citizens cannot be punished for partisan political activity, but federal and state employees can be dismissed and otherwise punished for that very reason. *Public Workers v. Mitchell*, 330 U.S. 75, 101, 91 L.Ed.2d 754, 67 S.Ct. 556 (1947); *CSC v. Letter Carriers*, 413 U.S. 548, 556, 37 L.Ed.2d 796, 93 S.Ct. 2880 (1973); *Broadrick v. Oklahoma*, 413 U.S. 601, 616-17, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973). Thus, the law has traditionally differentiated between the government as regulator of private conduct and the government in its capacity as an employer.

Patronage was a basis for government employment from the earliest days of the Republic. Then in *Elrod v. Burns*, 427 U.S. 347, 49 L.Ed.2d 547, 96 S.Ct. 2673 (1976), this Court significantly restricted patronage. Nonetheless, patronage continued to be viable, at least to the extent permitted by decisions of this Court. Given that the Constitution's prohibition against laws "abridging the freedom of speech" does not apply to laws enacted in the government's capacity as an employer in the same way it does to laws enacted in the government's capacity as

regulator of private conduct, it is clear that the patronage system is not *per se* unconstitutional.

When the Constitution is ambiguous as to a particular issue, and when the practice in question is not expressly prohibited by the test of the Bill of Rights, but bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, there is no proper constitutional basis for striking it down. This is not to say that tradition can supersede the unambiguous language of the Constitution, but only to suggest that an accepted tradition should not be scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by the Supreme Court.

The proper test in cases such as the one at bar should be whether the governmental advantages of the patronage system reasonably outweigh its coercive effect. When dealing with its own employees, the government may not act in a manner that is patently arbitrary or discriminatory. *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886, 896, 6 L.Ed.2d 1230, 81 S.Ct. 1743 (1961). But, regulations *are* valid if they bear a "rational connection" to the government end sought to be served. *Kelley v. Johnson*, 425 U.S. 238, 247, 47 L.Ed.2d 708, 96 S.Ct. 1440. In fact, this Court in *Broadrick v. Oklahoma*, 413 U.S. 601, 37 L.Ed.2d 830, 93 S.Ct. 2908 (1973), upheld restrictions on state employees directed at political expression, which if engaged in by private persons would plainly be protected by the First and the Fourteenth Amendments. Thus, because "government offices could not function if every employment decision became a constitutional matter," *Connick v. Myers*, 461 U.S. 138, 143, 75 L.Ed.2d 708,

103 S.Ct. 1684 (1983), this Court should afford a wide degree of deference to the employer's [government's] judgment that an employee's speech will interfere with close working relationships. *Connick*, 461 U.S. at 152, 75 L.Ed.2d at 708, 103 S.Ct. 1684. Since the government may dismiss an employee for political speech "reasonably deemed by Congress to interfere with the efficiency of the public service," *Public Workers v. Mitchell*, 330 U.S. 75, 101, 91 L.Ed. 754, 67 S.Ct. 556 (1947), it follows *a fortiori* that the government may dismiss an employee for political affiliation if "reasonably necessary to promote effective government." *Brown v. Glines*, 444 U.S. 348, 356, n. 13, 62 L.Ed.2d 540, 100 S.Ct. 594 (1980).

Because this area of constitutional jurisprudence is fraught with ambiguities, the deeply rooted tradition of the American people should be given effect. This Court in many other contexts has given great weight to history and tradition. *See Bowers v. Hardwick*, 478 U.S. 186, 192-194, 92 L.Ed.2d 140, 106 S.Ct. 2841 (1986) (examining consensual sodomy in light of long-standing history and tradition); *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604, 109 L.Ed.2d 631, 110 S.Ct. 2105 (1990) (considering tradition in evaluating claims that a particular procedure violates the due process clause); *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 537, 18 L.Ed.2d 930, 87 S.Ct. 1727 (1967) (considering the history of the judicial and public acceptance of the type of search in question when applying the Fourth Amendment's reasonableness test). Therefore, even if tradition is not dispositive of this issue, it should be afforded great weight when applying the aforementioned balancing test.

There are many advantages and disadvantages to the patronage system. The system clearly stabilizes political parties and prevents excessive political fragmentation. The patronage system provides incentives for the public to become involved in the political process; thus, more people become involved in government and the government more aptly reflects the views of the populous. Further, the patronage system stabilizes the party system by encouraging a two-party system. When getting a job is an available incentive for party workers, those attracted by that incentive are likely to work for a party that has the best chance of winning an election rather than some splinter group that has little hope of success. Not only is a two-party system more likely to emerge, but the differences of those parties are likely to be moderated as each party reflects its desire to appeal to the majority of the electorate. In addition, patronage has been a powerful means of achieving the social and political integration of excluded groups. *See e.g., Elrod v. Burns,* 427 U.S. 347, 376, 49 L.Ed.2d 547, 567, 96 S.Ct. 2673, ___ (1976) (Powell, J., dissenting). By supporting and ultimately dominating a particular party, racial and ethnic minorities reap the patronage awards that system has to offer. Thus, the abolition of patronage prevents groups that have only recently obtained political power from following this path of economic and social advancement. The patronage system demands only that the party worker is loyal to the organization itself, rather than a set of political beliefs. The party worker is clearly free to urge *within the organization* the adoption of any political position, but if that position is rejected by the party, he or she is definitely encouraged to vote and work for the party nonetheless.

Thus, even though the patronage system influences or redirects individual political expression and political association, it is not a *significant* impairment of free speech or free association.

The choice in question is not just between patronage and a merit-based civil service, but rather among various combinations of the two that may suit different political units in different areas. Once the courts reject as a criterion a long political tradition showing that party-based employment is entirely permissible, yet are unwilling to replace it with the principal that party-based employment is entirely impermissible, the courts have left the realm of law and entered the domain of political science. Clearly, the appropriate "mix" of party-based employment is a *political question* if there ever was one. Therefore, in light of the long-standing tradition in public policy, and absent a clear constitutional prohibition, the patronage system *cannot* be deemed unconstitutional.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NO. 93-6046

In Re: JEWELL CALL, Individually and
in his official capacity as
Fleming County Judge/Executive

PETITION FOR WRIT OF MANDAMUS

(Filed Aug. 13, 1993)

Petitioners, Jewell Call, individually and in his official capacity as Fleming County Judge/Executive, pursuant to 28 U.S.C. § 1651(a), and Fed. R. App. P. 21(a), by counsel, in support of their Petition for Writ of Mandamus, state as follows:

STATEMENT OF FACTS

William Mineer filed suit in district court for injunctive relief and damages for alleged constitutional violations, pursuant to 42 U.S.C. § 1983. (Exhibit 1). Mineer claimed that the termination of his employment without a pre-deprivation hearing violated his right to procedural due process under the Fourteenth Amendment to the United States Constitution. Mineer also claimed the Petitioners' actions were in retaliation for his political activity, in violation of the First Amendment. Mineer filed suit against Jewell Call, individually and in his official capacity as Fleming County Judge Executive and the Fleming County Magistrates, individually and in their official capacities. Petitioners moved for summary judgment. The district court granted the magistrates' motion as to Plaintiff's claims based on his First Amendment and state law

claims for wrongful discharge. The district court otherwise denied the motion for summary judgment. (Exhibit 2).

Judge Call and the magistrates appealed from the district court Order denying their motion for summary judgment on the issue of qualified immunity. [Sixth Circuit Docket #92-5368]. On May 4, 1993, a three judge panel of this court entered an Opinion and Order. (Exhibit 3). On page 1 of the Opinion, the following appears:

> **James P. Churchill,** Senior District Judge, delivered the opinion of the Court. **Guy,** circuit judge, delivered a separate opinion, concurring in part and dissenting in part, *in which* ***Ryan,*** *circuit judge, concurred.* (Emphasis added).

Judge Churchill opined that the magistrates were entitled to qualified immunity with respect to both the Fourteenth Amendment procedural due process claim and the First Amendment claim. Judges Guy and Ryan both concurred with this result. Judge Churchill did not agree that Petitioner Call individually was entitled to qualified immunity. However, Judge Guy opined that the county judge/executive *was* entitled to qualified immunity on both the Fourteenth and First Amendment claims, and Judge Ryan concurred. *Only* Judge Churchill opined that the county judge/executive was *not* entitled to qualified immunity., Thus, with respect to the county/judge executive, two members of the panel determined that Petitioner Call was entitled to qualified immunity. Consequently, Judge Executive Call, prevailed on *all* claims against him.

On June 2, 1993 the mandate issued from the Sixth Circuit. On June 18, 1993, Defendants, by counsel, served a motion to enforce the mandate in the district court. (Exhibit 4). On July 8, 1993, Plaintiff opposed Defendant's motion to enforce mandate. (Exhibit 5). On July 23, 1993, the district court filed its Opinion, Order, and Judgment. In its Opinion, the district court noted:

> Although the paragraph on page one of the Sixth Circuit's opinion is rather confusing, the Court finds that Judge Churchill's opinion is the opinion of the court. Therefore, all of the Plaintiffs claims against the Magistrates shall be dismissed and judgment entered in their favor. The claims against Defendant Call, however, remain and shall be set for jury trial.

(Exhibit 6).

In its Order, the court stated:

> 3. Assignment of the Plaintiff's remaining claims for jury trial is ***PASSED*** for thirty (30) days so that counsel for the Defendants may take appropriate action to clarify the decision of the United States Court of Appeals for the Sixth Circuit dated May 4, 1993. (Emphasis in original).

(Exhibit 7).

This Petition for Writ of Mandamus followed.

JURISDICTION

It is well established that a petition for writ of mandamus is the proper method by which a court may "construe its own mandate in connection with its opinion; and

if it finds that [a lower court] has erred, or acted beyond its province, in construing the mandate and opinion, to correct the mistake by a writ of mandamus." *Gaines v. Rugg*, 148 U.S. 228, 238, 37 L.Ed. 432, 435, 13 S.Ct. 611, ___ (1893); *see also, General Atomic Co. v. Feltner*, 436 U.S. 493, 56 L.Ed.2d 488, 98 S.Ct. 1939 (1978) (if lower court mistakes or misconstrues decree of higher court and does not give full effect to higher court's mandate, its action may be controlled by writ of mandamus to execute higher court's mandate); *Re N.V. Zind-Hollandsche Scheepvaart Mattschappij*, 64 F.2d 915 (5th Cir. 1933) (misconstruction by lower court of mandate of appellate court could be controlled by mandamus).

STATEMENT OF THE ISSUE PRESENTED

Whether the district court erred in failing to dismiss Plaintiff's complaint in its entirety and failed to enforce the mandate of the United States Court of Appeals for the Sixth Circuit when two out of three judges in a three judge panel of the Sixth Circuit agreed that the county judge/executive was entitled to qualified immunity?

STATEMENT OF THE RELIEF SOUGHT

Petitioner respectfully requests this Court to enter an order directing the district court to act in conformity with the May 4, 1993 Opinion and Order of the Sixth Circuit and in accordance with the June 2, 1993 mandate of the Sixth Circuit, and to enter an Order dismissing Plaintiff's complaint, with prejudice.

STATEMENT OF THE REASONS WHY THE WRIT SHOULD ISSUE

It is clear that, absent some direction or action by the Sixth Circuit, the district court is prepared to assign what it believes are Plaintiff's remaining claims for jury trial. This is so, despite the determination by the Court of Appeals. The three judge panel unanimously agreed that the magistrates are entitled to qualified immunity with respect to both the Fourteenth Amendment procedural due process claim and the First Amendment claim. With respect to Judge Executive Call, Judge Guy stated:

> I dissent on the qualified immunity issue as it relates to the County Executive. I would grant qualified immunity to him on both the Fourteenth and First Amendment claims.

(Exhibit 3, Judge Guy, concurring, page 1). Judge Ryan concurred with Judge Guy. *Only* Judge Churchill opined that the county judge/executive was not entitled to qualified immunity. Judge Churchill's opinion cannot be the opinion of the court. 28 U.S.C. § 46(d) provides:

> A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.

In other words, two of three judges constitutes a quorum. *Minniefield v. State of Alabama*, 542 F.2d 947 (5th Cir. 1976); *Wirth Ltd. v. S/S Acadia Forest*, 537 F.2d 1272, 1274 (5th Cir. 1976). Thus, with respect to the county judge/executive, two members of the panel voted in favor of qualified immunity and only one voted against. Consequently, if the district court allowed this case to proceed to jury trial rather than entering an Order of dismissal, the district

court would be acting in conflict with the order and mandate of the Sixth Circuit.

Moreover, to allow this case to proceed to trial, in light of this court's Opinion would violate the principles enunciated by the Supreme Court in *Mitchell v. Forsyth*, 472 U.S. 511, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985). As the Court noted in *Forsyth, Harlow [v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982)], . . . recognized an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law. The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

Mitchell, 472 U.S. at 526, 86 L.Ed.2d 425, 105 S.Ct. at ___.

Again citing *Harlow*, the Court in *Mitchell* noted that, "*Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible, as '[i]nquiries of this kind can be peculiarly disruptive of effective government.' " *Mitchell*, 472 U.S. at 526, 86 L.Ed.2d 425, 105 S.Ct. at ___ (quoting *Harlow v. Fitzgerald*, 457 U.S. at 817, 73 L.Ed.2d at ___, 102 S.Ct. at ___).

Here, the Sixth Circuit has determined that County Judge/Executive Call is entitled to qualified immunity. If County Judge/Executive Call is required to submit to a jury trial, the very circumstances which the Court in both *Harlow* and *Forsyth* predict, will occur. County Judge/Executive Call will be required to submit to a jury trial even though a three judge panel of this Court has determined he is entitled to qualified immunity, an immunity

from suit rather than a mere defense to liability. *See Mitchell*, 472 U.S. at 526, 86 L.Ed.2d at 425, 105 S.Ct. at ___. It is inconceivable to Petitioner that two judges of a three judge panel can rule that a Defendant is entitled to qualified immunity and the case still be permitted to go to trial in the district court. County Judge/Executive Call's qualified immunity will be "effectively lost" if this case is erroneously permitted to go to trial. *Id.* The circumstances in this case rise to the level of the "exceptional circumstances amounting to a judicial 'usurpation of power' [which justifies] the invocation of this extraordinary remedy." *In re Allied Signal, Inc.*, 915 F.2d 190, 191 (6th Cir. 1990) (quoting *In re Bendectin Products Liability Litigation*, 749 F.2d 300, 303 (6th Cir. 1984)).

CONCLUSION

Petitioner respectfully requests this Court to grant its Petition for Writ of Mandamus and direct the district court to enter an Order dismissing Plaintiff's complaint, with prejudice.

Respectfully submitted,

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CERTIFICATE

It is hereby certified that a true copy of the foregoing was served upon, by mail, this the 12th day of August, 1993, to:

Original plus 5 copies to:

Clerk, U.S. Court of Appeals
for the Sixth Circuit
538 U.S. Post Office & Courthouse
5th & Walnut Streets
Cincinnati, Ohio 45202

Copies to:
Honorable Thomas M. Troth
Honorable John Swinford
Post Office Box 397
Cynthiana, Kentucky 41031

Honorable John C. Price
Fleming County Attorney
Courthouse, Court Square
Fleminsburg, Kentucky 41041

Judge Karl S. Forester
United States District Court
Eastern District of Kentucky
at Lexington
P.O. Box 2165
Lexington, Kentucky 40595

/s/ R. Thaddeus Keal
R. THADDEUS KEAL

FILED
DEC 8 1993
OFFICE OF THE CLERK

No. 93-628

In The

Supreme Court of the United States

October Term, 1993

WILLIAM MINEER,

Petitioner,

versus

FLEMING COUNTY, KENTUCKY; FLEMING COUNTY FISCAL COURT; JEWELL CALL, Fleming County Judge/Executive, in his official and individual capacity; and the FLEMING COUNTY FISCAL COURT MEMBERS, Gary C. Harmon, Andy Cole, John Sims, Ronnie Carpenter, William Thompson, and L.C. Cord, in their official and individual capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

JURISDICTION

This Court does have jurisdiction to consider the Petition for Writ of Certiorari herein. The first opinion of the United States Court of Appeals for the Sixth Circuit was filed on May 4, 1993. (See Petitioner's Appendix "A" to Petition for Writ of Certiorari) That Opinion began as follows:

"James P. Churchill, Senior District Judge, *delivered the Opinion of the Court*. Guy, Circuit Judge, delivered a separate opinion, concurring in part and dissenting in part, in which Ryan, Circuit Judge, concurred" (Emphasis added).

Judge Churchill, in what the Sixth Circuit then described as *the Opinion of the Court*, found that the Magistrates were qualifiedly immune, but that Judge/Executive Call was not. Judge Guy, in his dissent from the *Opinion of the Court*, indicated that he would have granted both the Magistrates and the Judge/Executive qualified immunity.

The Defendants then filed a Motion to Enforce the Mandate of the District Court arguing that since it appeared that Judge Ryan agreed with Judge Guy's dissent, then that was actually the majority opinion of the Court. The Petitioner opposed that Motion indicating that the Clerk of the Court declined to interpret the opinion of the Court and also that a staff attorney with the Sixth Circuit Court of appeals advised Petitioner that obviously Judge Churchill's opinion and conclusion were the opinion and conclusion of the Sixth Circuit. Responding, the District Court noted that the Sixth Circuit's opinion was "rather confusing", but ruled that Judge Churchill's opinion was "actually *the Opinion of the Court*", and entered an Order and Judgment granting the Motion to Enforce the Mandate of the Sixth Circuit (per Judge Churchill's opinion) and denying the Motion to Dismiss the action (Emphasis added). He further ordered that the Magistrates be dismissed, but that the Plaintiff's remaining claims against the remaining Defendants be assigned for a jury trial, but allowed 30 days for Respondents' counsel

to seek a clarification of the decision of the Sixth Circuit Court of Appeals dated May 4, 1993. This Order was entered July 23, 1993.

The next pleading came in the form of a Petition for Writ of Mandamus filed by counsel for the Respondents. Although counsel for the Respondents would have this Court believe that only Defendant Call continued to litigate this matter after the Sixth Circuit's May 4, 1993, opinion (See Respondents' Brief in Opposition p.2), it wasn't until the District Court's order dismissing the Magistrates dated July 23, 1993, that counsel for Respondent began to caption his cases as "In Re: Jewell Call, Individually and in His Official Capacity as Fleming County Judge/Executive." Previously, Respondents had captioned all of their pleadings as "William Mineer vs. Fleming County, et. al."

Next preceding this Petition for Certiorari, the Sixth Circuit Court of Appeals, Judges Guy, Ryan and Churchill sitting, entered an Order (see Appendix B to Petition for Certiorari) on September 3, 1993, which stated in relevant part:

> "Judge Churchill's opinion concluded that the denial of Summary Judgment was reversed as to the Six Magistrates but affirmed as to the Petitioner. However, Judge Guy's opinion dissented as to the Petitioner and stated that he would grant the Petitioner qualified immunity. Judge Ryan concurred in that opinion and that concurrence effectively makes Judge Guy's opinion the majority opinion as to the Petitioner. Therefore, Judge Churchill's opinion expresses the majority result with respect to the Magistrates, but Judge Guy's opinion, even though

written as a dissent, states this Court's conclusions with respect to the Petitioner. This *clarification* should eliminate any confusion arising from the prior opinion.

It therefore is ordered that the District Court shall take all appropriate stops to enforce our mandate as stated above. In view of this *clarification*, it is ordered that the Petition for a Writ of Mandamus is dismissed." (Emphasis added.)

The Respondents argue that there is no authority either in the United States Code, the Rules of this Court or in the case law which would allow an automatic extension of time in which to file a Petition for Writ of Certiorari from a final opinion of a federal court of appeals simply because the Petitioner misunderstood the import of the decision of the Court of Appeals. What the Respondents fail to concede however, is that none of the parties to this action nor the United States District Judge understood how to interpret the Sixth Circuit's Court of Appeals May 4, 1993, opinion. This is readily evident by the numerous pleadings and clarifying orders following that opinion. Up until the District Court's order and opinion dated July 23, 1993, all of the Respondent's continued to litigate this matter. It wasn't until then that counsel for the Respondents tried to begin severing Call from the Magistrates.

In addressing situations exactly like the case at hand, this Court has held that:

"Only when a lower court changes matters of substance, *or resolves a genuine ambiguity*, in a judgment previously rendered should the period within which an appeal must be taken or

> a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by it's prior Judgment, had been *plainly* and properly settled with finality." (Emphasis added.)
>
> *Federal Trade Commission v. Minneapolis-Honeywell Regulator Company*, 344 U.S. 206, 211-12, 73 S.Ct. 245, 249, 97 L.Ed. 245 (1952).

This Petitioner submits that is it clear from the record that the May 4, 1993, opinion of the United States Court of Appeals for the Sixth Circuit created a genuine ambiguity, and that prior to the Sixth Circuit's final order entered September 3, 1993, none of the parties rights or obligations had been settled plainly and properly as mentioned in this Court's test articulated above. Even the District Court Judge was in agreement with the Petitioner's interpretation of the May 4, 1993, opinion and order until the Sixth Circuit handed down its September 3, 1993, clarification.

Therefore, Petitioner submits the Petition for Certiorari filed herein was timely and this Court has jurisdiction over its consideration.

Respectfully submitted,

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